

SECTION A

Goals of Course by Section

Informal Lecture and Viewgraphs

(30 minutes)

COURSE OBJECTIVE

At the conclusion of this workshop, each participant will have an understanding of the necessary skills required to build a successful solicitation, award, and administer a contract for commercial items.

Viewgraph A-1

The goals in each section are:

- The goal of the 60-minute morning section on Market Research is an understanding of the critical role market research plays in developing successful solicitations and contracts for commercial items.
- The goal of the 30-minute morning section on Requirements Documents for Commercial Items is an understanding of the importance of properly crafted requirements documents in developing successful solicitations and contracts for commercial items.
- The goal of the 60-minute morning section on Determining Whether to Use FAR Part 12 is an understanding of when FAR Part 12 is to be used for the solicitation or award of a contract.
- The goal of the 45-minute morning section on The Standard FAR Part 12 Clauses is an understanding of the FAR Part 12 clauses and their contents.
- The goal of the 60-minute afternoon session on the Standard Inspection, Acceptance and Warranty terms is to assure the student understands the standard inspection, acceptance, and warranty terms contained in the clause at FAR 52.212-4.
- The goal of the 60-minute afternoon section on Tailoring the Clause at FAR 52.212-4 is an understanding of customary commercial terms and conditions that may be identified through market research and how to include them in a FAR Part 12 solicitation or contract.

- The goal of the 15-minute morning section on Determining the Method of Procurement is knowledge of the appropriate uses of the procedures in FAR Parts 13, 14 and 15 for acquiring commercial items.
- The goal of the 30-minute morning section on The Standard FAR Part 12 Provisions is an understanding of the contents and usage of these provisions.
- The goal of the 75-minute morning section on Solicitation Preparation Using the SF 1449 is knowledge sufficient to prepare a successful solicitation for commercial items offers using this form.
- The goal of the 30-minute morning section on Solicitation Preparation Using the Combined Synopsis/Solicitation is knowledge sufficient to prepare a successful solicitation for acquiring commercial items using the combined synopsis/solicitation.
- The goal of the 30-minute morning section on Commercial Item Financing is an understanding of the appropriate contract financing techniques for commercial item contracts.
- The goal of the 30-minute afternoon section on Evaluation and Award is knowledge sufficient to select appropriate evaluation criteria for a best value commercial item acquisition and the successful evaluation of proposals in light of those criteria.
- The goal of the 30-minute afternoon section on Rejection of Supplies is an understanding of the standard procedures for rejecting nonconforming supplies or services under a contract for commercial items under FAR Part 12.
- The goal of the 30-minute afternoon section on Express Warranties is an understanding of the relationship of express warranties to implied warranties sufficient to evaluate whether an express warranty will increase or diminish the Government's rights for correction of defective supplies or services under a contract for commercial items.
- The goal in the 30-minute afternoon section on Termination is an understanding of the basic issues and steps in terminating a contract for commercial items under FAR Part 12.
- The goal of the 30-minute afternoon section on Key Points to Remember is to assure the student is able to summarize the key elements of acquiring commercial items.

SECTION B

Overview of Market Research

Informal Lecture and View-graphs

(60 minutes)

Learning Objective: Knowledge of the critical role market research plays in developing successful solicitations and contracts for commercial items.

MARKET RESEARCH DEFINITION

Market research is a process used to collect, organize, maintain, analyze, and present data for the purpose of maximizing the capabilities, technology, and competitive forces of the marketplace to meet an organization's needs for supplies or services.

Viewgraph B-1

1. The best place to begin the discussion of any acquisition, whether large or small, whether for a commercial or government-unique item, or even for services, is with a discussion of market research. As you will see, **market research is the foundation for building an effective solicitation and a successful contract.** This is particularly true for commercial items solicitations and contracts because government contracts personnel are limited by law, to include —
 - terms and conditions consistent with customary commercial practice.

Customary commercial practices are identified through market research.

Let's start by trying to define market research. Here's one definition: market research is a process used to collect, organize, maintain, analyze, and present data for the purpose of maximizing the capabilities, technology and competitive force of the marketplace to meet an organization's needs for supplies or services. I think we can quickly see that the first part of this definition, "a process used to collect, organize, maintain, analyze and present data," is a simple definition of research. **Market research is simply research about the marketplace.**

Research about the marketplace could go in many different directions depending on the purpose for which the information will be used. For example, information a company may need to determine whether to invest in a new product venture would differ from information needed by an investor that was trying to maximize growth in a portfolio of equities. Market research, as used by government acquisition personnel, is for the purpose of maximizing the capabilities, technology, and competitive forces available in the marketplace to meet an organization's needs for supplies or services.

MARKET RESEARCH IS THE FIRST STEP IN ANY ACQUISITION

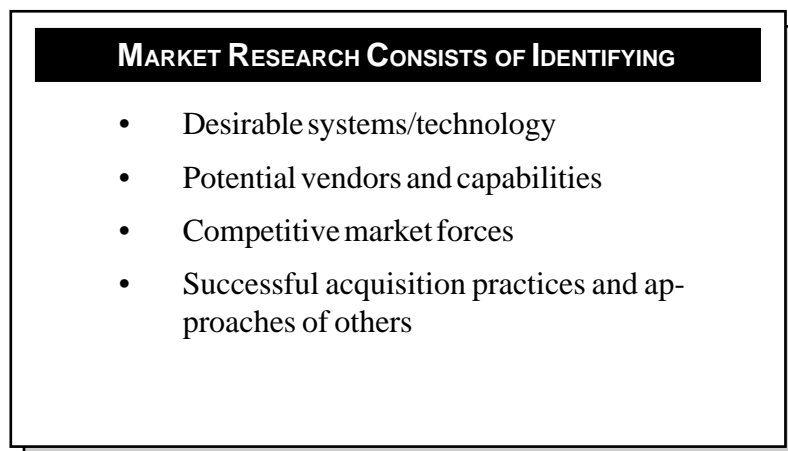
- Before developing new requirements documents.
- Before soliciting any offers over the Simplified Acquisition Threshold.
- Before soliciting offers under the Simplified Acquisition Threshold when adequate information is not available and cost is justified.

Viewgraph B-2

2. Because market research is the foundation for building an effective solicitation and a successful contract, the FAR appropriately requires agencies to conduct market research at the earliest stages in the acquisition process. **The FAR actually requires market research be conducted in two separate stages.** As we just discussed, researching the marketplace could take different paths depending on the purpose for which the information will be used. Let's expand on the investor who was trying to maximize growth in a portfolio of equities. The investor would focus on different information depending on the strategy chosen for selecting equities. If a "value" strategy is followed, the investor would examine the ratio of a company's stock price to the book value of its assets. If a "growth" strategy is being followed, the investor may not look at price-to-book ratio at all and, instead, focus on the company's potential earnings growth. Similarly, when market research is conducted by government acquisition personnel the

focus or specific purpose of the research relative to the acquisition process will determine the boundaries of what information will be collected and analyzed.

FAR requires market research be conducted before new requirements documents are developed. Market research is also required before any offers above the Simplified Acquisition Threshold are solicited and, when adequate information is not available and the cost is justified, before soliciting offers below the Simplified Acquisition Threshold. **The market research information will differ depending on whether the research is being conducted to develop a requirements document, to support preparation of a solicitation, or both.** Also, the skills required by the team conducting the market research will differ depending on the stage of the procurement process being supported.



Viewgraph B-3

3. The view-graph lists just some of the information that can be gathered through market research. These illustrate further what we were just discussing. Market research can be expected to identify desirable systems and technology and perhaps potential vendors and their capabilities in support of developing requirements statements. When conducted in support of preparing a solicitation for offers, market research can be used to identify the extent of competition in the market and, hopefully, successful acquisition practices and approaches of others that have purchased similar items or services.

MARKET RESEARCH PURPOSE — ACQUISITION PLANNING

- To promote and provide for acquisition of commercial items.
- To promote and provide for full and open competition.
- To have written acquisition plans address the results of market research.

Viewgraph B-4

4. **The primary purpose of market research is to support development of effective acquisition planning.** FAR 7.102 requires acquisition planning and market research for *all* acquisitions to promote and provide for —

- (1) Acquisition of commercial items or, to the extent that commercial items suitable to meet the agency's needs are not available, nondevelopmental items, to the maximum extent practicable.
- (2) Full and open competition or, when full and open competition is not required, to obtain competition to the maximum extent practicable, with due regard to the nature of the supplies or services to be acquired.

FAR 7.105 requires that written acquisition plans document how the information obtained through market research was used in developing various elements of the plan.

7.102 Policy.

- (a) *Agencies shall perform acquisition planning and conduct market research (see Part 10) for all acquisitions in order to promote and provide for—*
- (1) *Acquisition of commercial items or, to the extent that commercial items suitable to meet the agency's needs are not available, nondevelopmental items, to the maximum extent practicable (10 U.S.C. 2377 and 41 U.S.C. 251 et seq.); and*

- (2) *Full and open competition (see Part 6) or, when full and open competition is not required in accordance with Part 6, to obtain competition to the maximum extent practicable, with due regard to the nature of the supplies or services to be acquired (10 U.S.C. 2301(a)(5) and 41 U.S.C. 253a(a)(1)).*

**DETERMINING WHETHER NEEDS CAN BE MET BY ITEMS
AVAILABLE IN THE COMMERCIAL MARKETPLACE**

- Determine if there are sources capable of satisfying requirements.
- Determine if commercial items are available —
 - To meet requirements;
 - That could be modified to meet requirements; or
 - That could meet requirements if requirements are modified to a reasonable extent.

Viewgraph B-5

5. Market research is used to determine whether there are commercial sources and commercial items that can meet requirements, could be modified to meet requirements, or could meet requirements if requirements are modified to a reasonable extent. Later, we'll look at how information on commercial items may be applied to an acquisition. If commercial items were not available, we would also use market research to identify whether nondevelopmental items were available before pursuing the new development of a government-unique item. Also, we use market research to identify the extent to which commercial or nondevelopmental items could be incorporated as components of otherwise government-unique items.



Viewgraph B-6

6. When we look at building a solicitation for commercial items, we will see just how important information obtained through market research is to that process. To put it simply, **we no longer have government imposed terms that appear in the solicitation. We have a statutory requirement to acquire commercial items when they are available. When we acquire those commercial items we have a second statutory requirement to use “standard commercial terms and conditions.”**

What are standard commercial terms and conditions. You get the answer through market research because the “standard” differs depending on the commodity you are acquiring. As a quick example of this, let’s look at express warranties. What is the standard length of a commercial warranty? We can’t answer. We have to know the commodity we’re buying. Now let’s say the commodity we’re talking about is automobiles. Can we answer the question, “What is the standard length of an automobile warranty?” Again, the answer is no. We would have to conduct market research to identify the standard warranty terms being offered. This is true of a multitude of terms and conditions that govern the sale of commercial items in the commercial marketplace.



Viewgraph B-7

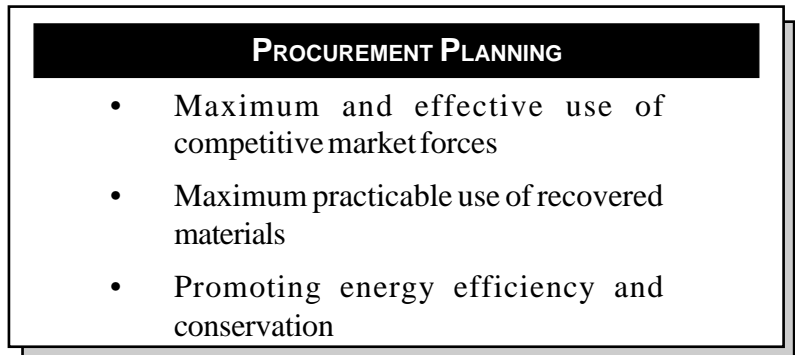
7. These are just some of the terms and conditions that govern the sale of commercial items in the commercial marketplace that we will identify through market research so that our solicitation can be structured to include “standard commercial terms and conditions.”



Viewgraph B-8

8. Just as we must identify standard terms and conditions used in the marketplace, we also must obtain information about commercial practices regarding customizing, modifying, or tailoring items to meet customer needs.

Market research is also used to determine the normal distribution and logistics support capabilities of the commercial market. If an item is in the commercial marketplace, it is being distributed and supported. The government should plan the acquisition and structure the solicitation and contract to maximize use of commercial distribution and support capabilities. Just as the commercial market offers the government access to state-of-the art technology and production efficiencies, it also offers efficient, cost-effective distribution and support capabilities.



Viewgraph B-9

9. Market research will -
- Identify levels of market competition
 - Identify sources potentially capable of satisfying requirements
 - Identify the extent of competitive pressures on --
 - (1) Price
 - (2) Quality
 - (3) Features
 - (4) Speed of technological improvement
 - (5) Energy efficiency
 - (6) Service
 - (7) Support
 - Identify items that could be modified to meet requirements
 - Permit the reasonable modification of requirements to expand potential sources

When planning an acquisition, acquisition personnel should maximize the use of competitive market forces. Through market research, the level of market competition and the number of potential sources capable of satisfying requirements should be identified. The extent of competition in the market and the nature of that competition should be factored into the acquisition strategy. Competition will dictate price, quality, available features, the speed of technological improvement, the energy efficiency of the items, and the quality of service and support. **The solicitation and contract should be structured to reflect the level of competition in the market and to maximize competitive pressures.** If limited competition

appears in the market, reasonably modify the requirements to expand the number of potential sources.

Market research also is used to identify information specific to the item being acquired concerning the availability of items that contain recovered materials and items that are energy efficient.

11. Now let's take a look at a sample market research report and review some of the key information we can expect it to contain.

MARKET REPORT

Security Requirements for The Desert Storm Museum

I. Background

The Desert Shield/Desert Storm commemorates the men and women who served in the Persian Gulf on behalf of our country during Operation Desert Shield/Storm. The museum houses many artifacts of the war and gifts of appreciation from the Saudi Arabia and Kuwait governments. Upgraded security measures are required for the museum.

II. System Requirements

- Five rooms within the museum, each 25' x 25', permanently house the museum's displays. Each room requires 24-hour-a-day/7 day-a-week video surveillance. An archived record of surveillance must be maintained with 30 days' data. The video system must be light-compensated for normal extremes of indoor lighting. The control and monitoring room is 8' x 10'.
- A walk-through personnel metal detection system will be installed at the main entrance to the Museum. The system must contain indicators for power and alarm; a minimum 12-digit keypad, hermetically sealed to resist dust and moisture; DB-15 Connector to be provided within computer console; Form C relay contacts and power supply voltages for auxiliary external alarm interfacing; RS-232 C data output port required; switchable power supply between 110 and 220 volts + 10% 50/60 HZ, 1.2 amps maximum draw required; humidity tolerance to 95% non-condensing required; throughput rate to be at least 50-60 detections per minute minimum; operating temperature is 10_ C to +55_ C; fault indicators shall consistently monitor each electronic system and announce any major failure; uniformity of the multi-field antenna must be equal in any position; sensor detection shall be bi-directional; and noise rejection to eliminate all radio frequency interference from portable 2-way, mobile, and base radios. Archway structure shall be gray Formica Plastic Laminate.
- Optional features for the walk-through personnel metal detection include one remote command center with 25' standard cable, one remote Annunciator Panel with 25' standard cable

and one weatherized archway portal.

- An uninterruptable power supply or other electrical backup system will be required to support the video and metal detection systems at full capacity for at least two hours.
- The selected contractor will be required to provide system design consulting, system installation and test, and training for operations personnel. The contractor will provide all necessary labor, equipment, tools, materials, and transportation to support design, installation, testing, and training.
- Both equipment and system warranty will be required.
- Extended warranty and training options will be required. Extended warranties should include 100% coverage of the installed system, 24-hour technical and emergency assistance (including weekends and holidays), 48-hour replacement parts (on most system components), 4 hours of training yearly on the installed system (excluding training at the time of installation), and 3-yearly preventive maintenance checks (cleaning and tuning every 4-months), and one camera.

III. Schedule

Installation needed not later than September 30 1996.

IV. Potential Suppliers

No sources were provided on the purchase request by the requiring activity. To ensure that market research efforts would provide comprehensive acquisition management information, our search focused on identifying commercial sources: (a) recognized as providers of the above requirements; (b) currently under contract with DoD to provide security systems services; and (c) those DoD services/agencies with open/active security systems services contracts.

1. The Thomas Register (world wide web edition) was utilized to identify commercial sources of Security Systems and Surveillance Systems. Initial research queries resulted in identifying over 20,000 commercial suppliers. Search qualifiers were more narrowly defined and efforts resulted in identifying 111 commercial providers. A capabilities/product review downsized this selection to 19 firms (Attachment A).

2. The Eagle Eye FY95 Prime Contract Award database (based on DD350 information) was searched utilizing SIC Code 7382, Security Systems Services. Search efforts resulted in identifying 31 prime contractors who currently are under contract with DoD to provide security systems services (Attachment B).
3. To identify DoD services/agencies with open/active security systems service contracts (FSC63), we again searched the Eagle Eye database. This search resulted in identifying four (4) purchasing activities (Attachment C).

The above search efforts provided sufficient information to conduct this market survey. Other references, such as contacting GSA's contract representative to gather market information on Schedule No. 63 I, Alarm and Signal Systems; SBA's U.S. Government Purchasing & Sales Directory; SBA's Procurement Automated Source System (PASS) database; the Department of Commerce ABELS minority contractor database; DoD's 4205.1-3 Report (DoD Subcontracting Opportunities with DoD Major Prime Contractors); and many other commercial or electronic sources were available, but not utilized.

V. Distinguishing Characteristics

All system components – the video cameras, monitor(s), recorder, control unit, and personnel metal detector – are commercial items. Many variations and small product differentiators exist among the potential offerors' equipment.

VI. Market Analysis

After discussing industry approaches to similar systems, including other museum applications and federal buildings, several refinements to system requirements and to the contracting strategy became apparent:

1. While the total system could be done by any of the providers, there are really two systems which could be differentiated. The video surveillance system and the personnel metal detection system are not integrated and could be contracted separately without difficulty.
2. The consulting, purchasing, installing, and training can best be done by a single contractor – a turnkey contract. Mixing contractors in a system as small as this is very inefficient and is likely to produce breaks in continuity of

service, training and warranty.

3. One-year warranties for all equipment and the installed system are industry standard and should be specified as the minimum.
4. All firms lease and sell. Lease agreements require a security deposit equal to one or two months' lease payments and can be applied to the purchase price at lease-end, or is returned at the end of the lease period. Lease agreements may not be canceled, but the equipment may be upgraded prior to expiration of the initial term. Various lease arrangements are available such as Seasonal Lease Plans, Step-Payment Plans and 90-Day Deferred Plans.
5. It is not practical to look for suppliers who do not have a local presence. Non-local suppliers would have non-competitive installation costs and would be able to provide no direct service. They may try to use local contractors, but quality problems are more likely under such a scenario.
6. Training is normal, but not a universal component of system installations. It should be specified.
7. High value museum items are not sufficiently protected by video surveillance alone. Consideration should be made for the integration of other security systems such as motion or contact sensors.
8. High value museum items, combined with certain types of buildings or building locations may suggest perimeter alarm systems. Capability to integrate these systems should be included.
9. Maintenance contracts are normal for post-warranty periods and the option should be specified. A depot-repair, or component mail-in, option is less expensive than an on-site repair option.
10. The time to do the installation could vary from one to three months depending on architectural issues.

VII. Customary Commercial Terms and Conditions

1. Commercial Item Purchase Payment Terms. Two types of payment terms are standard within the industry. The first is a Net 30 arrangement with payment due after system installation and turnover. The second type in-

volves a 25% deposit at time of order, 50% upon delivery, and 25% at completion of installation and turnover.

2. Freight. FOB shipping point or FOB destination – as specified in contract.
3. Delivery.
 - *Time.* Most systems can be delivered within 45 days.
 - *Place.* Buyer's stipulated destination or seller's location.
 - *Quantity.* Single units/lots or several lots.
4. Acceptance of Offer/Quote: Proposal is voidable, by the seller, unless accepted and delivered to them within thirty (30) days from the date of quote. Disclosure states that the proposal is not for publication and is issued expressly on the condition that it is not to be copied, reprinted or reproduced in any manner; nor is it to be disclosed to any third party, either wholly or in part, without the express written consent of the seller.
5. Performance: All material is guaranteed to be as specified. All work will be completed in a workmanlike manner according to standard practices. Any alteration or deviation from specifications involving extra cost will be executed only upon written orders and will become an extra charge over and above the original quoted value. All workers are fully covered by Workmen's Compensation Insurance.
6. Acceptance/Rejection of Goods.
 - *Seller responsibility.* Deliver all equipment to job site; supply all necessary low voltage cables for proper system operation; run all cables as required; mount all equipment; perform all final adjustments and systems test; train assigned personnel in proper system operation; provide all necessary drawings and documentation.
 - *Buyer's responsibility.* Buyer to designate one responsible individual as the point of contact; buyer to inspect goods upon delivery to ensure conformity to contract requirements *prior* to issuing payment. If the goods upon delivery fail *in any respect* to conform to the contract, the buyer may (a) reject the goods at that

time or (b) opt to accept the delivery of goods in spite of the non-conformity. Partial acceptance may be accomplished.

7. Warranty. Security systems come with a one-year full-coverage warranty (all components). Warranty becomes effective either after the date of installation/delivery or the effective date of the Warranty Agreement. Warranty may be extended up to five years and will cover the entire system. The warranty will not cover any damage to the system or its components that is caused by one or more of the following: misuse, abuse, vandalism, fire, Act of God, unprotected power surges, service by unauthorized persons or other damage not related to the installation, manufacturing or operation of the installed or purchased equipment.

The list below highlights the details of the warranty. The cost for one year of extended warranty is based on 10% of the systems purchase price.

- 100% of the installed system is covered;
- 24-hour technical and emergency assistance (including weekends and holidays);
- 48-hour replacement parts (on most system components);
- 4-hours of training yearly on the installed system (excluding training at the time of installation);
- 3-yearly preventive maintenance checks (cleaning and tuning every 4-months); and
- One camera relocation (with existing equipment).

VIII. Market Price

A fair market price is easily determined in this competitive market. The cost of equipment is not likely to be a large discriminator. The installation estimates and the comprehensive system costs including training and warranty are the likely discriminators. All telephone respondents believed that \$150,000 to be very much above the market price for such a turnkey system.

The walk-through personnel metal detection system ranges in price from \$3,495.00 to \$6,345.00 depending on whether the system provides single-pulse or dual-pulse technology, variable

levels of programming to customize volume and sensitivity settings and for changing the metal discrimination programs, audible alarm tones, and various optional features.

IX. Trends in Supply and Demand

Security systems is a highly competitive and growing market with many hundreds of competent firms. It is also a technology-driven market with increasing capabilities and decreasing costs, reflecting the underlying technologies of computational power applied to small control systems. Demand in this market is increasing and so is the supply. However, because of the local nature of service, there is less consolidation than one might expect for such a ubiquitous industry. There are some exceptions, such as Wells Fargo and Siemens, among others.

X. Concerns About Quality

Individual components in both systems are highly reliable. However, overall systems do require periodic preventive and corrective maintenance because of the nature of hardware and electronic equipment. Most quality defects will likely come as a result of deficiencies in planning or installing the installation. An experienced turnkey contractor is most likely to build a trouble-free system. A turnkey contractor also has more at stake in the system than if the project was severable.

XI. Acquisition History

The prices paid previously by the Government for security-type systems ranged from \$43,000 to \$270,000. An inquiry has been generated and a response is anticipated within fifteen days. An update to this market report will be generated at that time.

Attachments

Attachment A Thomas Register

Attachment B Eagle Eye FY95 Prime Contract Awards - SIC Code 7382
(Security Systems Services)

Attachment C Government Purchasing Offices for FSC63
(Security Systems)

Attachment A: THOMAS REGISTER SEARCH RESULTS

I. X-Ray Security Systems

Company Name	Company Address
EG&G, Inc. (Corporate)	Wheeling, IL
Control Screening LP	Northvale, NJ 07647-2219
Heimann Systems Div Siemens Components, Inc.	Iselin, NJ
Torfino Enterprises, Inc.	West Palm Beach, FL
Siemens Corporation	Iselin, NJ
Federal Labs Systems/ Scan-Tech. Sec	Northvale, NJ
Caerocom Internation, Inc. C.E.I Group	Laval, PQ Canada

II. Surveillance Cameras

Company Name	Company Address
Phase I Technology Corp	Deer Park, NY
Toshiba CCTV Group Video Communication & Information Systems, A Division of Toshiba America Consumer Products	Buffaco Grove, IL
Loronix Information Systems	Durango, CO
Diamond Electronics, Inc.	Lancaster, OH
Surveillance Systems, Inc.	Linfield, PA
Control Security & Surveillance, Inc.	Austin, TX
Wells Fargo Alarm Services	King of Prussia, PA
Controlled Access, Inc.	Moorestown, NJ
Integrated Access Systems of New England, Inc.	Glastonbury, CT
Integrated Access Systems, Inc.	Bensalem, PA
Detection Systems & Engineering Co.	Troy, MI
Integrated Access Systems, Inc.	Whippany, NJ

***Attachment B: EAGLE EYE FY95 PRIME
CONTRACT AWARDS
for SIC Code 7382, Security Systems Services***

I. Security Systems Services

Company Size	Company Name	Company Address
Large	Kastle Systems, Inc.	1501 Wilson Blvd. Arlington, VA 22209-2403
Large	Honeywell, Inc.	8975 Three Chapt Road Richmond, VA 23229-4656
Small	Integrated Systems, Inc.	2300 W. Park Place Blvd. Stone Mountain, GA 30087-3561
Small	International Research Assoc.	8030 Cessna Avenue Gaithersburg, MD 20879-4119
Small	Dynalec Corp	87 W. Main Street Sodus, NY 14551-1137
Large	Nation, Inc.	788 Shrewsbury Avenue Eatontown, NJ 07724-3080
Large	MFS Network Technologies, Inc.	1200 Landmark Center, Ste 1300J Omaha, NE 68102
Large	Wells Fargo Alarm Svcs	1010 N. Glebe Road, Ste 680 Arlington, VA 22201-5706
Large	Prudential Security Svcs	1000 Apollo Court #J Antioch, CA 94509-7514
Large	Safemasters Company, Inc.	5655 General Washington Drive Alexandria, VA 22312-2452
SDB	C.A.E. & Associates, Inc.	11400 Airport Road, Ste B Everett, WA 98204-3745
Large	The Foxboro Company	600 N. Bedford Street East Bridgewater, MA 02333-1199
WOB	Executive Security & Engr Tech	900 2nd Street, NE, Suite 112 Washington, D.C. 20002-3557

II. Maintenance/Repair of Security Systems Services

Company Size	Company Name	Company Address
Small	Secur-Data Systems Inc.	7340 Executive Way Frederick, MD 21701-9405
Small	Central Security & Electric	104 E. 11th Street Rolla, MO 65401-2866
Small	ALSS, Inc.	3093 E. Main Road Portsmouth, RI 02871-4126
Small	National Guardian Sec Svcs	550 Barneveld Avenue San Francisco, CA 94124-1878
Small	PSC, Inc.	20271 Goldenrod Lane Germantown, MD 20876-4064

III. Facilities Operations /Visitor Control /Guard Services/Surveillance Services

Company Size	Company Name	Company Address
Small	XERAD, Inc.	767 Paseo Miramar Pacific Palisades, CA 90272-3026
Small	North American Video & Sound Company	2222 N. Memorial Pkwy, Ste G Huntsville, AL 35810-4515
Small	SecurityEast, Inc.	792 Hartford Tpke Shrewsbury, MA 01545-4107
SDB	Integrity Intl Sec Svcs	211 S. 6th Street Clarksville, TN 37040-3607
SDB	WMP Security Svc Co.	San Diego, CA
Small	Custom House	4500 3rd Avenue, SE Lacey, WA 98503-1053

IV. Installation of Alarm/Signal Systems

Company Size	Company Name	Company Address
Small	Advantor Corp	6101 Lake Ellenor Drive Orland, FA 32809-4660
Small	Digital Applications, Inc.	2101 Executive Drive Hampton, VA 23666-2404
Small	Controlled Access Concepts	3959 Pender Drive, Ste 109 Fairfax, VA 22030-6041
SDB	Omnisec Corp	7926 Jones Branch Drive McLean, VA 22102-3323

V. Lease/Rental of Alarm and Signal Systems

Company Size	Company Name	Company Address
Large	ADT Security Systems Mid-South	7399 Boston Blvd. Springfield, VA 22153
Small	Sentrex, Inc.	3823 Highcliff Drive San Antonio, TX 78218-2423

***Attachment C: Government Purchasing Offices for
FSC63 (Security Systems)***

FSC #	Purchasing Organization Name	Purchasing Organization Address
6350	Defense Logistics Agency	Defense Supply Center Richmond ATTN:DGSC-P Richmond, VA 23297-5000
6350	Department of the Navy	Space & Naval Warfare Systems Command (SPAWAR) 2511 Jefferson Davis Highway Arlington, VA 22202-9999
6350	Department of the Navy	Naval Supply Center Puget Sound Bremerton WA (NSC Puget) Bremerton, WA 98314-5100
6350	Department of the Navy	Naval Surface Warfare Center White Oak, Maryland 20903-5000

FAC 90—32 OCTOBER 1, 1995

PART 10

MARKET RESEARCH

10.000 Scope of part.

This part prescribes policies and procedures for conducting market research to arrive at the most suitable approach to acquiring, distributing, and supporting supplies and services. This part implements requirements of 41 U.S.C. 253a(a)(1), 41 U.S.C. 264b, and 10 U.S.C. 2377.

10.001 Policy.

(a) Agencies shall—

(1) Ensure that legitimate needs are identified and trade-offs evaluated to acquire items which meet those needs;

(2) Conduct market research appropriate to the circumstances—

(i) Before developing new requirements documents for an acquisition by that agency;

(ii) Before soliciting offers for acquisitions with an estimated value in excess of the simplified acquisition threshold; and

(iii) Before soliciting offers for acquisitions with an estimated value less than the simplified acquisition threshold when adequate information is not available and the circumstances justify its cost; and

(3) Use the results of market research to—

(i) Determine if sources capable of satisfying the agency's requirements exist;

(ii) Determine if commercial items or, to the extent commercial items suitable to meet the agency's needs are not available, nondevelopmental items are available that—

(A) Meet the agency's requirements;

(B) Could be modified to meet the agency's requirements; or

(C) Could meet the agency's requirements if those requirements were modified to a reasonable extent;

(iii) Determine the extent to which commercial items or nondevelopmental items could be incorporated at the component level;

(iv) Determine the practices of firms engaged in producing, distributing, and supporting commercial items, such as terms for warranties, buyer financing, maintenance and packaging, and marking; and

(v) Ensure maximum practicable use of recovered

materials (see Subpart 23.4) and promote energy conservation and efficiency.

(b) When conducting market research, agencies should not request potential sources to submit more than the minimum information necessary.

10.002 Procedures.

(a) Acquisitions begin with a description of the Government's needs stated in terms sufficient to allow conduct of market research.

(b) Market research is then conducted to determine if commercial items or nondevelopmental items are available to meet the Government's needs or could be modified to meet the Government's needs.

(1) The extent of market research will vary, depending on such factors as urgency, estimated dollar value, complexity, and past experience. Market research involves obtaining information specific to the item being acquired and should include—

(i) Whether the Government's needs can be met by—

(A) Items of a type customarily available in the commercial marketplace;

(B) Items of a type customarily available in the commercial marketplace with modifications; or

(C) Items used exclusively for governmental purposes;

(ii) Customary practices regarding customizing, modifying or tailoring of items to meet customer needs and associated costs;

(iii) Customary practices, including warranty, buyer financing, discounts, etc., under which commercial sales of the products are made;

(iv) The requirements of any laws and regulations unique to the item being acquired;

(v) The availability of items that contain recovered materials and items that are energy efficient;

(vi) The distribution and support capabilities of potential suppliers, including alternative arrangements and cost estimates; and

(vii) Size and status of potential sources (see Part 19).

(2) Techniques for conducting market research may include any or all of the following:

(i) Contacting knowledgeable individuals in Government and industry regarding market capabilities to meet requirements.

(ii) Reviewing the results of recent market

FAC 90—32 OCTOBER 1, 1995

10.002

FEDERAL ACQUISITION REGULATION (FAR)

research undertaken to meet similar or identical requirements.

(iii) Publishing formal requests for information in appropriate technical or scientific journals or business publications.

(iv) Querying Government data bases that provide information relevant to agency acquisitions.

(v) Participating in interactive, on-line communication among industry, acquisition personnel, and customers.

(vi) Obtaining source lists of similar items from other contracting activities or agencies, trade associations or other sources.

(vii) Reviewing catalogs and other generally available product literature published by manufacturers, distributors, and dealers or available on-line.

(viii) Conducting interchange meetings or holding presolicitation conferences to involve potential offerors early in the acquisition process.

(c) If market research indicates commercial or nondevelopmental items might not be available to satisfy agency

needs, agencies shall reevaluate the need in accordance with 10.001(a)(3)(ii) and determine whether the need can be restated to permit commercial or nondevelopmental items to satisfy the agency's needs.

(d)(1) If market research establishes that the Government's need may be met by a type of item or service customarily available in the commercial marketplace that would meet the definition of a commercial item at Subpart 2.1, the contracting officer shall solicit and award any resultant contract using the policies and procedures in Part 12.

(2) If market research establishes that the Government's need cannot be met by a type of item or service customarily available in the marketplace, Part 12 shall not be used. When publication of the notice at 5.201 is required, the contracting officer shall include a notice to prospective offerors that the Government does not intend to use Part 12 for the acquisition (see 5.207(e)(4)).

(e) Agencies should document the results of market research in a manner appropriate to the size and complexity of the acquisition.

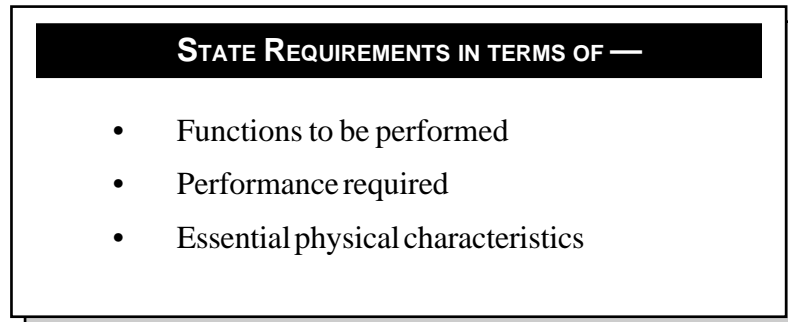
SECTION C

Requirements Documents for Commercial Items

Informal Lecture and View-graphs

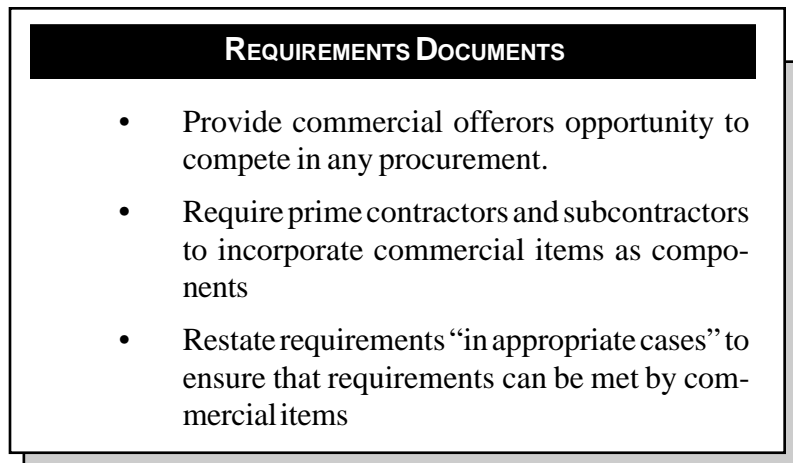
(30 minutes)

Learning Objective: Knowledge of the importance of properly crafted requirements documents in developing successful solicitations and contracts for commercial items.



Viewgraph C-1

1. A good place to begin this discussion is to note the title change from the old FAR Part 10 – “Specifications, Standards, and Other Purchase Descriptions,” to the new FAR Part 11 – “Describing Agency Needs.” This change marks an important shift from specifying how our needs are to be met to describing our needs in a manner that permits offerors to propose the best possible solution to meeting those needs.
2. The FAR requires that requirements for an acquisition be stated in terms of the specific function to be performed or performance required and the essential physical characteristics. Product descriptions should evolve from the user’s requirement and from information on item and industry capabilities identified during the market research.



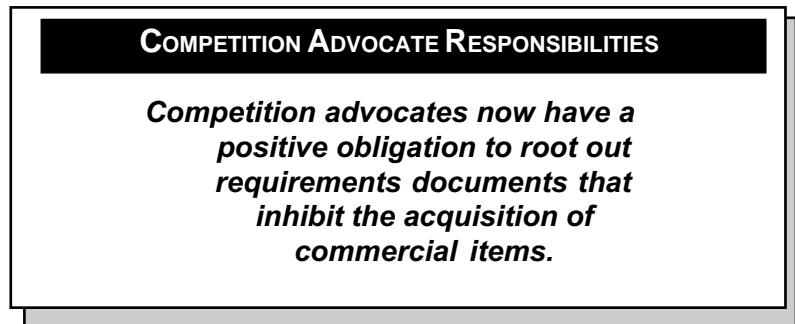
Viewgraph C-2

3. Requirements are stated in terms of function to be performed, performance required, and essential physical characteristics to allow maximum flexibility for potential suppliers to use their own established products and practices to meet the government's requirement. **This is contrasted with specifying a specific design or process that limits potential sources to those capable of manufacturing in accordance with the design or performing the process.** Product descriptions should evolve from the user's requirement and from information on item and industry capabilities identified during market research.

Contractually, this statutory requirement is implemented by inclusion of the clause at FAR 52.244-6, Subcontracts for Commercial Items and Commercial Components, which is required in any Government contract for other than commercial items. Paragraph (b) of that clause states, “To the maximum extent practicable, the Contractor shall incorporate, and require its subcontractors at all tiers to incorporate, commercial items or nondevelopmental items , as components of items to be supplied under this contract.”

Ever since the Competition in Contracting Act was implemented in 1985, contracting professionals have been examining requirements statements and restating them, in appropriate cases, to ensure adequate competition. Now this task has been broadened to ensure that requirements documents are examined and restated in appropriate cases to ensure that requirements can be met by a commercial item. One of the tell-tale signs of a requirements document that restricts commercial applications would be inclusion of Federal Government or Military Specifications and Stan-

dards for an item that otherwise would meet the definition of a commercial item. **It is the responsibility of all acquisition personnel, especially the competition advocates, to challenge inclusion of restrictive requirements that preclude commercial solutions to the government's requirements.**



Viewgraph C-3

4. Competition advocates for procuring activities have responsibility for –
 - a. Promoting the acquisition of commercial items and,
 - b. Challenging barriers to such acquisitions, such as –
 - (1) Unnecessarily restrictive statements of need;
 - (2) Unnecessarily detailed specifications; and
 - (3) Unnecessarily burdensome contract clauses.

This follows what we just discussed. Although it is the responsibility of all acquisition personnel, FASA placed responsibility for challenging unnecessarily restrictive requirements and eliminating artificial barriers to commercial items acquisitions squarely on the shoulders of competition advocates.

5. The FAR establishes an order of precedence for requirements documents.

Requirements Documents - Order of Precedence

- a. Documents mandated by law.
- b. Performance-oriented documents:
 - 1. Non-government voluntary standards.
 - 2. Commercial item descriptions.
 - 3. Federal specifications and standards.
 - 4. Defense specifications and standards.
- c. Detailed Design-oriented documents.
 - 1. Non-government voluntary standards.
 - 2. Federal specifications and standards.
 - 3. Defense specifications and standards.
- d. Agency-unique standards, specifications for the non-repetitive acquisition of items.

First, applicable documents mandated by law, such as Federal Aviation Administration Standards or Environmental Protection Agency standards must be used. Following documents mandated by law, there is a general precedence for performance-oriented documents over design-oriented documents. This implements the statutory requirement that requirements be stated in terms of functions to be performed, performance required, and essential physical characteristics. Within these two categories are subcategories of requirements documents that are used in declining order of preference.

- (1) **Non-government voluntary standards** are developed by private-sector organizations, which plan, develop, establish, or coordinate standards, product descriptions, handbooks, or related documents. They can describe items or processes (such as test methods). Non-government standards may have been adopted by the Department of Defense and listed in the DoD Index of Specifications and Standards. However, you can use any suitable non-government standard, whether or not it's been adopted. Because non-government standards are developed by consensus involving all interested parties, they normally document commer-

cial practices or standards for an item or process and are valuable tools in developing product descriptions for commercial items.

- (2) **Commercial item descriptions** are simplified product descriptions that describe commercial items that meet the government's needs. They are normally developed when commercial items will be purchased on a repetitive basis. These item descriptions are developed based on a user's requirements, market research, and coordination with industry.
- (3) **Federal specifications and standards** are used for military-unique items when development of a standardization document is justified.
- (4) **Defense specifications and standards** are used for military-unique items when development of a standardization document is justified.

Lastly, agency-unique standards or specifications for the non-repetitive acquisition of items are used. These are program-peculiar documents that describe items developed and produced for use under a specific program, or as part of a single system, that have no application outside that program or system. They are frequently used to buy systems. Even program-peculiar documents should encourage the use of commercial items as subsystems, components, and support equipment. This can be facilitated by applying market research to identify opportunities to maximize commercial item usage in the system.

Tips for Selecting and Developing Product Descriptions from *the DoD Acquisition Deskbook*

Communicate with the user. Continuous two-way communication between the user and the person preparing the product description is essential — to ensure that the description accurately reflects the user's requirement and to communicate information gained during market research.

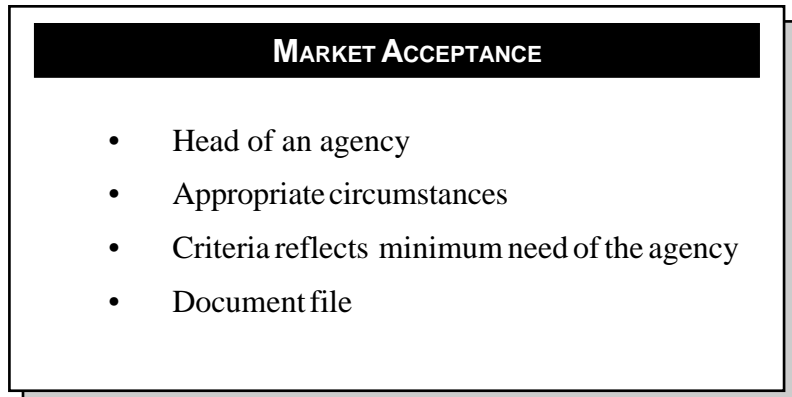
Maintain consistency between the product description and the evaluation criteria. The product description must be consistent with the evaluation process and vice versa — to attain the overall best value for the Department of Defense.

Consider the intended environment. If the intended environment is similar to that for which the item was designed, you should be able to use existing commercial standards. If a commercial item will be used in a more severe environment, you will need to include those special characteristics.

Evaluate market standards and practices. For existing items, the market will have established standards for quality, production, and materials, as well as for item support, technical data, and warranties. Deviating from prevailing market standards and practices can erode the benefits of using commercial items.

Establish flexibility in the operational requirement to allow consideration of a broader range of alternatives. The product description should reflect the user's flexibility by stating requirements in terms of acceptable ranges, targets, or desired and/or required values rather than exact values.

Document market research results. Market research information should indicate the potential for use of commercial items and the basis for many of the characteristics contained in the product description.



Viewgraph C-4

6. Market Acceptance

Historically, market acceptance was a technique used to specify a requirement for a commercial item so that the government could gauge an offered item's ability to perform an intended use by using criteria to show that the item had been accepted in the commercial marketplace to perform the same or a similar function. Under the Federal Acquisition Streamlining Act of 1994, market acceptance criteria may still be used. However, because of the broad statutory definition of commercial items, use of market acceptance criteria will constrict the pool of available items to only those that have been *accepted*, (i.e. sold) in the market. Because of this, there are statutory restrictions on using market acceptance criteria and a requirement **that the file clearly document the circumstances that justify using market acceptance criteria and that support the specific criteria used.** Note carefully that FAR 11.103, Market Acceptance, shifts from contracting officer decision-making authority, which runs throughout FAR Parts 10, 11 and 12, to authority provided to "the head of an agency." The FAR states that **the head of an agency may, under appropriate circumstances,** require offerors to demonstrate that the items offered have either—

- a. Achieved commercial market acceptance or been satisfactorily supplied to an agency under current or recent contracts for the same or similar requirements; and
- b. Otherwise meet the item description, specifications, or other criteria prescribed in the public notice and solicitation.
 - **Appropriate circumstances** may, for example, include situations where the agency's minimum need is for an item

that has a demonstrated reliability or a performance or product support record in a specified environment. Use of market acceptance is inappropriate when new or evolving items may meet the agency's needs.

- **Criteria** for demonstrating an item has commercial market acceptance:
 - a. Reflect the minimum need of the agency and are reasonably related to the demonstration of the item's acceptability to meet the need;
 - b. Relate to an item's performance and intended use, not to an offeror's capability;
 - c. Are supported by market research;
 - d. Include consideration of items supplied satisfactorily under recent or current government contracts for the same or similar items; and
 - e. Reflect the entire relevant commercial market, including small business concerns.

- **Precautions**

The FAR cautions that commercial market acceptance should not be used as the sole criterion to evaluate whether an item meets the government's requirements.

The FAR also requires that the file contain documentation to –

- (1) **Describe the circumstances that justify using market acceptance criteria; and**
- (2) **Support the specific criteria used.**

7. The FAR also establishes a new "commerciality" test in determining whether to require contractors to use only new (or recycled) materials in their deliverables.

FAC 90—32 OCTOBER 1, 1995

PART 11

DESCRIBING AGENCY NEEDS

11.000 Scope of part.

This part prescribes policies and procedures for describing agency needs.

11.001 Definitions.

"Material," as used in this part, includes, but is not limited to, raw material, parts, items, components, and end products.

"New," as used in this part, means previously unused or composed of previously unused materials and may include unused residual inventory or unused former Government surplus property.

"Other than new," as used in this part, includes, but is not limited to, recycled, recovered, remanufactured, used, and reconditioned.

"Reconditioned," as used in this part, means restored to an earlier normal operating condition by readjustments and replacement of parts.

"Remanufactured," as used in this part, means factory rebuilt to new equipment performance specification and unused subsequent to rebuilding.

11.002 Policy.

(a) In fulfilling requirements of 10 U.S.C. 2305(a)(1), 10 U.S.C. 2377, 41 U.S.C. 253a(a), and 41 U.S.C. 264b, agencies shall—

(1) Specify needs using market research in a manner designed to—

(i) Promote full and open competition (see Part 6), with due regard to the nature of the supplies or services to be acquired; and

(ii) Only include restrictive provisions or conditions to the extent necessary to satisfy the minimum needs of the agency or as authorized by law.

(2) To the maximum extent practicable, ensure that acquisition officials—

(i) State requirements with respect to an acquisition of supplies or services in terms of—

(A) Functions to be performed;

(B) Performance required; or

(C) Essential physical characteristics;

(ii) Define requirements in terms that enable and encourage offerors to supply commercial items, or, to the extent that commercial items suitable to meet the

agency's needs are not available, nondevelopmental items, in response to the agency solicitations;

(iii) Provide offerors of commercial items and nondevelopmental items an opportunity to compete in any acquisition to fill such requirements;

(iv) Require prime contractors and subcontractors at all tiers under the agency contracts to incorporate commercial items or nondevelopmental items as components of items supplied to the agency; and

(v) Modify requirements in appropriate cases to ensure that the requirements can be met by commercial items or, to the extent that commercial items suitable to meet the agency's needs are not available, nondevelopmental items.

(b) The Metric Conversion Act of 1975, as amended by the Omnibus Trade and Competitiveness Act of 1988 (15 U.S.C. 205a, *et. seq.*), designates the metric system of measurement as the preferred system of weights and measures for United States trade and commerce, and it requires that each agency use the metric system of measurement in its acquisitions, except to the extent that such use is impracticable or is likely to cause significant inefficiencies or loss of markets to United States firms. Requiring activities are responsible for establishing guidance implementing this policy in formulating their requirements for acquisitions.

(c) To the extent practicable and consistent with Subpart 9.5, potential offerors should be given an opportunity to comment on agency requirements or to recommend application and tailoring of requirements documents and alternative approaches. Requiring agencies should apply specifications, standards, and related documents initially for guidance only, making final decisions on the application and tailoring of these documents as a product of the design and development process. Requiring agencies should not dictate detailed design solutions prematurely (see 7.101 and 7.105(a)(8)).

(d) The Resource Conservation and Recovery Act of 1976 (42 U.S.C. 6901, *et. seq.*), as amended, and Executive Order 12873, dated October 20, 1993, establish requirements for the procurement of products containing recovered materials, and environmentally preferable and energy-efficient products and services. Requiring activities shall prepare plans, drawings, specifications, standards (including voluntary standards), and purchase descriptions that consider the requirements set forth in Part 23.

FAC 90—32 OCTOBER 1, 1995

11.101

FEDERAL ACQUISITION REGULATION (FAR)

**SUBPART 11.1—SELECTING AND DEVELOPING
REQUIREMENTS DOCUMENTS**

11.101 Order of precedence for requirements documents.

(a) Agencies may select from existing requirements documents, modify or combine existing requirements documents, or create new requirements documents to meet agency needs, consistent with the following order of precedence:

- (1) Documents mandated for use by law.
- (2) Performance-oriented documents.
- (3) Detailed design-oriented documents.
- (4) Standards, specifications and related publications issued by the Government outside the Defense or Federal series for the non-repetitive acquisition of items.

(b) Agencies should prepare product descriptions to achieve maximum practicable use of recovered material and other materials that are environmentally preferable (see Subparts 23.4 and 23.7).

11.102 Standardization program.

Agencies shall select existing requirements documents or develop new requirements documents that meet the needs of the agency in accordance with the guidance contained in the Federal Standardization Manual and, for DOD components, DOD 4120.3-M, Defense Standardization Program Policies and Procedures. The Federal Standardization Manual may be obtained from General Services Administration, Federal Supply Service Bureau, Specifications Section, Suite 8100, 470 L'Enfant Plaza, SW, Washington, DC 20407. DOD 4120.3-M may be obtained from DOD Single Stock Point, Standardization Document Order Desk, Building 4D, 700 Robbins Avenue, Philadelphia, PA 19111-5094.

11.103 Market acceptance.

(a) Section 8002(c) of Pub. L. 103-355 provides that, in accordance with agency procedures, the head of an agency may, under appropriate circumstances, require offerors to demonstrate that the items offered—

- (1) Have either—
 - (i) Achieved commercial market acceptance; or
 - (ii) Been satisfactorily supplied to an agency under current or recent contracts for the same or similar requirements; and
- (2) Otherwise meet the item description, specifications, or other criteria prescribed in the public notice and solicitation.

(b) Appropriate circumstances may, for example, include situations where the agency's minimum need is for an item that has a demonstrated reliability, performance or product support record in a specified environment. Use of market acceptance is inappropriate when new or evolving items may meet the agency's needs.

11-2

(c) In developing criteria for demonstrating that an item has achieved commercial market acceptance, the contracting officer shall ensure the criteria in the solicitation—

- (1) Reflect the minimum need of the agency and are reasonably related to the demonstration of an item's acceptability to meet the agency's minimum need;
- (2) Relate to an item's performance and intended use, not an offeror's capability;
- (3) Are supported by market research;
- (4) Include consideration of items supplied satisfactorily under recent or current Government contracts, for the same or similar items; and
- (5) Consider the entire relevant commercial market, including small business concerns.

(d) Commercial market acceptance shall not be used as a sole criterion to evaluate whether an item meets the Government's requirements.

(e) When commercial market acceptance is used, the contracting officer shall document the file to—

- (1) Describe the circumstances justifying the use of commercial market acceptance criteria; and
- (2) Support the specific criteria being used.

11.104 Items peculiar to one manufacturer.

Agency requirements shall not be written so as to require a particular brand-name, product, or a feature of a product, peculiar to one manufacturer, thereby precluding consideration of a product manufactured by another company, unless—

(a) The particular brand-name, product, or feature is essential to the Government's requirements, and market research indicates other companies' similar products, or products lacking the particular feature, do not meet, or can not be modified to meet, the agency's minimum needs; and

(b) The authority to contract without providing for full and open competition is supported by the required justifications and approvals (see 6.302-1).

**SUBPART 11.2—USING AND MAINTAINING
REQUIREMENTS DOCUMENTS**

11.201 Identification and availability of specifications.

(a) Solicitations citing requirements documents listed in the General Services Administration (GSA) Index of Federal Specifications, Standards and Commercial Item Descriptions, the DoD Index of Specifications and Standards (DoDISS), or other agency index shall identify each document's approval date and the dates of any applicable amendments and revisions. Do not use general identification references, such as "the issue in effect on the date of the solicitation." Contracting offices will not normally furnish these cited documents with the solicitation, except when—

- (1) The requirements document must be furnished with the solicitation to enable prospective contractors to make a competent evaluation of the solicitation;

FAC 90—32 OCTOBER 1, 1995

PART 11—DESCRIBING AGENCY NEEDS

11.301

(2) In the judgment of the contracting officer, it would be impracticable for prospective contractors to obtain the documents in reasonable time to respond to the solicitation; or

(3) A prospective contractor requests a copy of a Government promulgated requirements document.

(b) Contracting offices shall clearly identify in the solicitation any pertinent documents not listed in the GSA Index of Federal Specifications, Standards and Commercial Item Descriptions or DoDISS. Such documents shall be furnished with the solicitation or specific instructions shall be furnished for obtaining or examining such documents.

(c) When documents refer to other documents, such references shall (1) be restricted to documents, or appropriate portions of documents, that apply in the acquisition; (2) cite the extent of their applicability; (3) not conflict with other documents and provisions of the solicitation; and (4) identify all applicable first tier references.

(d) The GSA Index of Federal Specifications, Standards and Commercial Item Descriptions may be purchased from the General Services Administration, Federal Supply Service Bureau, Specification Section, Suite 8100, 470 L'Enfant Plaza, SW, Washington, DC 20407, telephone (202) 755-0325/0326. The DoDISS may be purchased from the Standardization Documents Desk, Building 4D, 700 Robbins Avenue, Philadelphia, PA 19111-5094, telephone (215) 697-2569.

(e) Agencies may generally obtain from the GSA Specification Section or the DOD Standardization Documents Desk those nongovernment (voluntary) standards adopted for use by Federal or Defense activities. Standards not available from these sources may be obtained from Government libraries, activities subscribing to document handling services or the organization responsible for the preparation, publication or maintenance of the standard.

11.202 Maintenance of standardization documents.

(a) Recommendations for changes to standardization documents listed in the GSA Index of Federal Specifications, Standards and Commercial Item Descriptions should be submitted to the General Services Administration, Federal Supply Service, Office of Acquisition, Washington, DC 20406. Agencies shall submit recommendations for changes to standardization documents listed in the DoDISS to the cognizant preparing activity.

(b) When an agency cites an existing standardization document but modifies it to meet its needs, the agency shall follow the guidance in Federal Standardization Manual and, for Defense components, DoD 4120.3-M, Defense Standardization Program Policies and Procedures.

11.203 Customer satisfaction.

Acquisition organizations shall communicate with cus-

tomers to determine how well the requirements document reflects the customer's needs and to obtain suggestions for corrective actions. Whenever practicable, the agency may provide affected industry an opportunity to comment on the requirements documents.

11.204 Solicitation provisions and contract clauses.

(a) The contracting officer shall insert the provision at 52.211-1, Availability of Specifications Listed in the GSA Index of Federal Specifications, Standards and Commercial Item Descriptions, in solicitations that (1) are issued by civilian agency contracting offices and (2) cite specifications listed in the Index that are not furnished with the solicitation.

(b) The contracting officer shall insert the provision at 52.211-2, Availability of Specifications Listed in the DoD Index of Specifications and Standards (DoDISS), in solicitations that (1) are issued by DoD contracting offices and (2) cite specifications listed in the DoDISS that are not furnished with the solicitation.

(c) The contracting officer shall insert a provision substantially the same as the provision at 52.211-3, Availability of Specifications Not Listed in the GSA Index of Federal Specifications, Standards and Commercial Item Descriptions, in solicitations that cite specifications that are not listed in the Index and are not furnished with the solicitation, but may be obtained from a designated source.

(d) The contracting officer shall insert a provision substantially the same as the provision at 52.211-4, Availability for Examination of Specifications Not Listed in the GSA Index of Federal Specifications, Standards and Commercial Item Descriptions, in solicitations that cite specifications that are not listed in the Index and are available for examination at a specified location.

SUBPART 11.3—ACQUIRING OTHER THAN NEW MATERIAL, FORMER GOVERNMENT SURPLUS PROPERTY, AND RESIDUAL INVENTORY.

11.301 Policy.

(a) Agencies shall allow offers of other than new material, former Government surplus property, or residual inventory unless it is determined that such materials are unacceptable. When acquiring commercial items, the contracting officer should consider the customary practice in the industry for the item being acquired. When only new material is acceptable, the solicitation shall clearly identify the material that must be new. Offerors providing other than new material shall be required to comply with the clause at 52.211-5, New Material, the provision at 52.211-6, Listing of Other Than New Material, Residual Inventory, and Former Government Surplus Property, and the clause at 52.211-7, Other Than New Material, Residual Inventory, and Former Government Surplus Property, as appropriate.

(b) Agencies shall specify products, including packag-

11-3

FAC 90—32 OCTOBER 1, 1995

11.302

FEDERAL ACQUISITION REGULATION (FAR)

ing, that contain the highest practicable percentage of recovered and environmentally preferable materials, and where applicable, post-consumer material, consistent with performance requirements, availability, price reasonableness, and cost-effectiveness.

(c) Contracting officers shall consider the following when determining whether other than new materials, former Government surplus property, or residual inventory are acceptable:

- (1) Safety of persons or property.
- (2) Specification and performance requirements.
- (3) Price reasonableness.
- (4) Total cost to the Government (including maintenance, inspection, testing, and useful life).

(d) When a contract calls for material to be furnished at cost, the allowable charge for former Government surplus property shall not exceed the cost at which the contractor acquired the property.

11.302 Solicitation provisions and contract clauses.

(a) The contracting officer may insert the clause at 52.211-5, New Material, in solicitations and contracts for supplies. The clause shall not be used if it would be contrary to customary commercial practices for the item being acquired.

(b) The contracting officer shall insert the provision at 52.211-6, Listing of Other Than New Material, Residual Inventory, and Former Government Surplus Property, in solicitations containing the clause at 52.211-5.

(c) The contracting officer shall insert the clause at 52.211-7, Other Than New Material, Residual Inventory, and Former Government Surplus Property, in contracts containing the clause at 52.211-5.

SUBPART 11.4—DELIVERY OR PERFORMANCE SCHEDULES

11.401 General.

(a) The time of delivery or performance is an essential contract element and shall be clearly stated in solicitations. Contracting officers shall ensure that delivery or performance schedules are realistic and meet the requirements of the acquisition. Schedules that are unnecessarily short or difficult to attain (1) tend to restrict competition, (2) are inconsistent with small business policies, and (3) may result in higher contract prices.

(b) Solicitations shall, except when clearly unnecessary, inform bidders or offerors of the basis on which their bids or proposals will be evaluated with respect to time of delivery or performance.

(c) If timely delivery or performance is unusually important to the Government, liquidated damages clauses may be used (see Subpart 11.5).

11.402 Factors to consider in establishing schedules.

(a) *Supplies or services.* When establishing a contract

delivery or performance schedule, consideration shall be given to applicable factors such as the—

- (1) Urgency of need;
- (2) Industry practices;
- (3) Market conditions;
- (4) Transportation time;
- (5) Production time;
- (6) Capabilities of small business concerns;
- (7) Administrative time for obtaining and evaluating offers and for awarding contracts;
- (8) Time for contractors to comply with any conditions precedent to contract performance; and
- (9) Time for the Government to perform its obligations under the contract; e.g., furnishing Government property.

(b) *Construction.* When scheduling the time for completion of a construction contract, the contracting officer shall consider applicable factors such as the—

- (1) Nature and complexity of the project;
- (2) Construction seasons involved;
- (3) Required completion date;
- (4) Availability of materials and equipment;
- (5) Capacity of the contractor to perform; and
- (6) Use of multiple completion dates. (In any given contract, separate completion dates may be established for separable items of work. When multiple completion dates are used, requests for extension of time must be evaluated with respect to each item, and the affected completion dates modified when appropriate.)

11.403 Supplies or services.

(a) The contracting officer may express contract delivery or performance schedules in terms of—

- (1) Specific calendar dates;
- (2) Specific periods from the date of the contract; i.e., from the date of award or acceptance by the Government, or from the date shown as the effective date of the contract;

(3) Specific periods from the date of receipt by the contractor of the notice of award or acceptance by the Government (including notice by receipt of contract document executed by the Government); or

(4) Specific time for delivery after receipt by the contractor of each individual order issued under the contract, as in indefinite delivery type contracts and GSA schedules.

(b) The time specified for contract performance should not be curtailed to the prejudice of the contractor because of delay by the Government in giving notice of award.

(c) If the delivery schedule is based on the date of the contract, the contracting officer shall mail or otherwise furnish to the contractor the contract, notice of award, acceptance of proposal, or other contract document not later than the date of the contract.

(d) If the delivery schedule is based on the date the con-

FAC 90—32 OCTOBER 1, 1995

PART 11—DESCRIBING AGENCY NEEDS

11.502

tractor receives the notice of award, or if the delivery schedule is expressed in terms of specific calendar dates on the assumption that the notice of award will be received by a specified date, the contracting officer shall send the contract, notice of award, acceptance of proposal, or other contract document by certified mail, return receipt requested, or by any other method that will provide evidence of the date of receipt.

(e) In invitations for bids, if the delivery schedule is based on the date of the contract, and a bid offers delivery based on the date the contractor receives the contract or notice of award, the contracting officer shall evaluate the bid by adding 5 calendar days (as representing the normal time for arrival through ordinary mail). If the contract or notice of award will be transmitted electronically, (1) the solicitation shall so state; and (2) the contracting officer shall evaluate delivery schedule based on the date of contract receipt or notice of award, by adding one working day. (The term "working day" excludes weekends and U.S. Federal holidays.) If the offered delivery date computed with mailing or transmittal time is later than the delivery date required by the invitation for bids, the bid shall be considered nonresponsive and rejected. If award is made, the delivery date will be the number of days offered in the bid after the contractor actually receives the notice of award.

11.404 Contract clauses.

(a) *Supplies or services.* (1) The contracting officer may use a time of delivery clause to set forth a required delivery schedule and to allow an offeror to propose an alternative delivery schedule. The clauses and their alternates may be used in solicitations and contracts for other than construction and architect-engineering substantially as shown, or they may be changed or new clauses written.

(2) The contracting officer may insert in solicitations and contracts other than those for construction and architect-engineering, a clause substantially the same as the clause at 52.211-8, Time of Delivery, if the Government requires delivery by a particular time and the delivery schedule is to be based on the date of the contract. If the delivery schedule is expressed in terms of specific calendar dates or specific periods and is based on an assumed date of award, the contracting officer may use the clause with its Alternate I. If the delivery schedule is expressed in terms of specific calendar dates or specific periods and is based on an assumed date the contractor will receive notice of award, the contracting officer may use the clause with its Alternate II. If the delivery schedule is to be based on the actual date the contractor receives a written notice of award, the contracting officer may use the clause with its Alternate III.

(3) The contracting officer may insert in solicitations and contracts other than those for construction and architect-engineering, a clause substantially the same as

the clause at 52.211-9, Desired and Required Time of Delivery, if the Government desires delivery by a certain time but requires delivery by a specified later time, and the delivery schedule is to be based on the date of the contract. If the delivery schedule is expressed in terms of specific calendar dates or specific periods and is based on an assumed date of award, the contracting officer may use the clause with its Alternate I. If the delivery schedule is expressed in terms of specific calendar dates or specific periods and is based on an assumed date the contractor will receive notice of award, the contracting officer may use the clause with its Alternate II. If the delivery schedule is to be based on the actual date the contractor receives a written notice of award, the contracting officer may use the clause with its Alternate III.

(b) *Construction.* The contracting officer shall insert the clause at 52.211-10, Commencement, Prosecution, and Completion of Work, in solicitations and contracts when a fixed-price construction contract is contemplated. The clause may be changed to accommodate the issuance of orders under indefinite-delivery contracts. If the completion date is expressed as a specific calendar date, computed on the basis of the contractor receiving the notice to proceed by a certain day, the contracting officer may use the clause with its Alternate I.

SUBPART 11.5—LIQUIDATED DAMAGES**11.501 General.**

This subpart provides policies and procedures for the use of liquidated damages clauses in solicitations and contracts for supplies, services, and construction.

11.502 Policy.

(a) Liquidated damages clauses should be used only when both (1) the time of delivery or performance is such an important factor in the award of the contract that the Government may reasonably expect to suffer damage if the delivery or performance is delinquent, and (2) the extent or amount of such damage would be difficult or impossible to ascertain or prove. In deciding whether to include a liquidated damage clause in a contract, the contracting officer should consider the probable effect on such matters as pricing, competition, and the costs and difficulties of contract administration.

(b) The rate of liquidated damages used must be reasonable and considered on a case-by-case basis since liquidated damages fixed without any reference to probable actual damages may be held to be a penalty, and therefore unenforceable. The contract may also include an overall maximum dollar amount or period of time, or both, during which liquidated damages may be assessed, to ensure that the result is not an unreasonable assessment of liquidated damages.

11-5

FAC 90—32 OCTOBER 1, 1995

11.503

FEDERAL ACQUISITION REGULATION (FAR)

(c) The contracting officer shall take all reasonable steps to mitigate liquidated damages. If a liquidated damages clause is included in a contract and a basis for termination for default exists, the contracting officer should take appropriate action expeditiously to obtain performance by the contractor or to terminate the contract (see Subpart 49.4). If delivery or performance is desired after termination for default, efforts must be made to obtain the delivery or performance elsewhere within a reasonable time. Efficient administration of contracts containing a liquidated damages clause is imperative to prevent undue loss to defaulting contractors and to protect the interests of the Government.

(d) If a contract provides for liquidated damages for delay, the Comptroller General, on the recommendation of the head of the agency concerned, is authorized and empowered by law to make a remission, that in the discretion of the Comptroller General is just and equitable, of the whole or any part of such damages.

11.503 Procedures.

(a) If a liquidated damages clause is to be used in a contract, the applicable clause and appropriate rate(s) of liquidated damages shall be included in the solicitation.

(b) If a liquidated damages clause is used in a construction contract, the rate(s) of liquidated damages to be assessed against the contractor should be for each day of delay and the rate(s) should as a minimum cover the estimated cost of inspection and superintendence for each day of delay in completion. Whenever the Government will suffer other specific losses due to the failure of the contractor to complete the work on time, the rate(s) should also include an amount for these items. Examples of specific losses are—

- (1) The cost of substitute facilities;
- (2) The rental of buildings and/or equipment; or
- (3) The continued payment of quarters allowances.

(c) If appropriate to reflect the probable damages, considering that the Government can terminate for default or take other appropriate action, the rate of assessment of liquidated damages may be in two or more increments which provide a declining rate of assessment as the delinquency continues. The contract may also include an overall maximum dollar amount or period of time, or both, during which liquidated damages may be assessed, to ensure that the result is not an unreasonable assessment of liquidated damages.

11.504 Contract clauses.

(a) The contracting officer may insert the clause at 52.211-11, Liquidated Damages—Supplies, Services, or Research and Development, in solicitations and contracts when a fixed-price contract is contemplated for supplies, services, or research and development (see 11.502).

(b) The contracting officer may insert the clause at 52.211-12, Liquidated Damages—Construction, in solicita-

tions and contracts for construction, except construction contracts on a cost-plus-fixed-fee basis (see 11.502). If different completion dates are specified in the contract for separate parts or stages of the work, the contracting officer shall use the clause with its Alternate I.

(c) The contracting officer shall insert the clause at 52.211-13, Time Extensions, in solicitations and contracts for construction in which the clause at 52.211-12, Liquidated Damages—Construction, is used with its Alternate I.

SUBPART 11.6—PRIORITIES AND ALLOCATIONS

11.600 Scope of subpart.

This subpart implements the Defense Priorities and Allocations System (DPAS), a Department of Commerce (DOC) regulation in support of authorized national defense programs (see 15 CFR 700).

11.601 Definitions.

“Authorized program,” as used in this subpart, means a program approved by the Federal Emergency Management Agency (FEMA) for priorities and allocations support under the Defense Production Act of 1950, as amended (50 U.S.C. app. 2061, *et. seq.*), to promote the national defense. Schedule I of the DPAS lists currently authorized programs.

“Controlled materials,” as used in this subpart, means the various shapes and forms of steel, copper, aluminum, and nickel alloys specified in Schedule II, and defined in Schedule III, of the DPAS.

“Delegate Agency,” as used in this subpart, means an agency of the U.S. Government authorized by delegation from DOC to place priority ratings on contracts that support authorized programs. Schedule I of the DPAS lists the Delegate Agencies.

“Rated order” means a prime contract for any product, service, or material (including controlled materials) placed by a Delegate Agency under the provisions of the DPAS in support of an authorized program and which require preferential treatment, and includes subcontracts and purchase orders resulting under such contracts.

11.602 General.

(a) Under Title I of the Defense Production Act of 1950, as amended (50 U.S.C. app. 2061, *et. seq.*), the President is authorized (1) to require that contracts in support of the national defense be accepted and performed on a preferential or priority basis over all other contracts, and (2) to allocate materials and facilities in such a manner as to promote the national defense.

(b) The Office of Industrial Resource Administration (OIRA), DOC, is responsible for administering and enforcing a system of priorities and allocations to carry out Title I of the Defense Production Act for industrial items. The DPAS has been established to promote the timely availabil-

FAC 90—32 OCTOBER 1, 1995

PART 11—DESCRIBING AGENCY NEEDS

11.701

ity of the necessary industrial resources to meet current national defense requirements and to provide a framework to facilitate rapid industrial mobilization in case of national emergency.

(c) The Delegate Agencies (see Schedule I of the DPAS) have been given authority by DOC to place rated orders in support of authorized programs. Other government agencies, Canada, and other friendly foreign nations may apply for special rating authority in support of authorized programs (see 15 CFR 700.55).

(d) Rated orders shall be placed in accordance with the procedures in the DPAS. Contracting officers responsible for acquisitions in support of authorized programs shall be familiar with the DPAS and should provide guidance on the DPAS to contractors and suppliers receiving rated orders. Agency heads shall ensure compliance with the DPAS by contracting activities within their agencies.

(e) Under the Defense Production Act, any willful violation of the Act, the DPAS, or any official action taken by DOC under the DPAS, is a crime punishable by a maximum fine of \$10,000, one year in prison, or both (see 15 CFR 700.70 and 15 CFR 700.74).

11.603 Procedures.

(a) There are two levels of priority for rated orders established by the DPAS, identified by the rating symbols "DO" and "DX." All DO rated orders have equal priority with each other and take preference over unrated orders. All DX rated orders have equal priority with each other and take preference over DO rated and unrated orders. DX ratings are used for special defense programs designated by the President to be of the highest national priority.

(b) DOC may issue a Directive to compel a contractor or supplier to accept a rated order, to rearrange production or delivery schedules, or to improve shipments against particular rated orders. Directives issued by DOC take precedence over all rated and unrated orders as stated in the Directive.

(c) In addition to any other contractual requirements, a valid rated order must contain (see 15 CFR 700.12) the following:

(1) A priority rating consisting of the appropriate DO or DX rating symbol and a program or identification symbol to indicate the authorized program (see Schedule I of the DPAS).

(2) A required delivery date or delivery dates.

(3) The signature of an individual authorized by the agency to sign rated orders.

(d) The DPAS has the following three basic elements which are essential to the operation of the system:

(1) *Mandatory acceptance of rated orders.* A rated order shall be accepted by a contractor or supplier unless rejected for the reasons provided for mandatory rejection in 15 CFR 700.13(b), or for optional rejection in 15 CFR 700.13(c).

(2) *Mandatory extension of priority ratings through-*

out the acquisition chain. Contractors and suppliers receiving rated orders shall extend priority ratings to subcontractors or vendors when acquiring items to fill the rated orders (see 15 CFR 700.15).

(3) *Priority scheduling of production and delivery.* Contractors and suppliers receiving rated orders shall give the rated orders priority over other contracts as needed to meet delivery requirements (see 15 CFR 700.14).

(e) Agencies shall provide contracting activities with specific guidance on the issuance of rated orders in support of agency programs.

(f) Contracting officers shall follow agency procedural instructions concerning the use of rated orders in support of agency programs.

(g) Contracting officers, contractors, or subcontractors at any tier, that experience difficulty placing rated orders, obtaining timely delivery under rated orders, locating a contractor or supplier to fill a rated order, ensuring that rated orders receive preferential treatment by contractors or suppliers, or require rating authority for items not automatically ratable under the DPAS, should promptly seek special priorities assistance in accordance with agency procedures (see 15 CFR 700.50-55).

(h) Contracting officers shall report promptly any violations of the DPAS to DOC in accordance with agency procedures.

11.604 Solicitation provision and contract clause.

(a) Contracting officers shall insert the provision at 52.211-14, Notice of Priority Rating for National Defense Use, in solicitations when the contract to be awarded will be a rated order.

(b) Contracting officers shall insert the clause at 52.211-15, Defense Priority and Allocation Requirements, in contracts that are rated orders.

SUBPART 11.7—VARIATION IN QUANTITY**11.701 Supply contracts.**

(a) A fixed-price supply contract may authorize Government acceptance of a variation in the quantity of items called for if the variation is caused by conditions of loading, shipping, or packing, or by allowances in manufacturing processes. Any permissible variation shall be stated as a percentage and it may be an increase, a decrease, or a combination of both; however, contracts for subsistence items may use other applicable terms of variation in quantity.

(b) There should be no standard or usual variation percentage. The overrun or underrun permitted in each contract should be based upon the normal commercial practices of a particular industry for a particular item, and the permitted percentage should be no larger than is necessary to afford a contractor reasonable protection. The permissi-

11-7

FAC 90—32 OCTOBER 1, 1995

11.702

FEDERAL ACQUISITION REGULATION (FAR)

ble variation shall not exceed plus or minus 10 percent unless a different limitation is established in agency regulations. Consideration shall be given to the quantity to which the percentage variation applies. For example, when delivery will be made to multiple destinations and it is desired that the quantity variation apply to the item quantity for each destination, this requirement must be stated in the contract.

(c) Contractors are responsible for delivery of the specified quantity of items in a fixed-price contract, within allowable variations, if any. If a contractor delivers a quantity of items in excess of the contract requirements plus any allowable variation in quantity, particularly small dollar value overshipments, it results in unnecessary administrative costs to the Government in determining disposition of the excess quantity. Accordingly, the contract may include the clause at 52.211-10, *Delivery of Excess Quantities*, to provide that—

(1) Excess quantities of items totaling up to \$250 in value may be retained without compensating the contractor; and

(2) Excess quantities of items totaling over \$250 in value may, at the Government's option, be either returned at the contractor's expense or retained and paid for at the contract unit price.

11.702 Construction contracts.

Construction contracts may authorize a variation in estimated quantities of unit-priced items. When the variation

between the estimated quantity and the actual quantity of a unit-priced item is more than plus or minus 15 percent, an equitable adjustment in the contract price shall be made upon the demand of either the Government or the contractor. The contractor may request an extension of time if the quantity variation is such as to cause an increase in the time necessary for completion. The contracting officer must receive the request in writing within 10 days from the beginning of the period of delay. However, the contracting officer may extend this time limit before the date of final settlement of the contract. The contracting officer shall ascertain the facts and make any adjustment for extending the completion date that the findings justify.

11.703 Contract clauses.

(a) The contracting officer shall insert the clause at 52.211-16, *Variation in Quantity*, in solicitations and contracts, when a fixed-price supply contract is contemplated for supplies, and for services that involve the furnishing of supplies.

(b) The contracting officer may insert the clause at 52.211-17, *Delivery of Excess Quantities*, in solicitations and contracts when a fixed-price supply contract is contemplated.

(c) The contracting officer shall insert the clause at 52.211-18, *Variation in Estimated Quantity*, in solicitations and contracts when a fixed-price construction contract is contemplated that authorizes a variation in the estimated quantity of unit-priced items.

SECTION D

Determining Whether to Use FAR Part 12

Informal Lecture, Viewgraphs and discussion. (60 minutes)

Learning Objective: An understanding of when FAR Part 12 is to be used for solicitation or award of a contract.

DEFINITION OF COMMERCIAL ITEMS

*Any item that is **of a type** customarily used for nongovernmental purposes and ...*

Viewgraph D-1a

DEFINITION OF COMMERCIAL ITEMS (CONTINUED)

- that has been sold, leased, licensed or offered for sale, lease, or license to the general public.
- An item that evolved from a commercial item through advances in technology or performance that will be available in time to satisfy the delivery requirements.
- Modifications of a type customarily available in the marketplace.
- Minor modifications made to meet Federal Government requirements.

Viewgraph D-1b

1. Obviously, the definition is very broad. However, many people read the definition as if it read, “Any item that is customarily used for non-governmental purposes.” Such a reading is followed by “a *commercialty determination*,” a determination to be made concerning *the item* in question. This is wrong. The definition is far broader than that. Look at what the first sentence of the definition really says—“Commercial items means any item, other than real property, that is *of a type* customarily used for non-governmental purposes ...”

Commerciality is not determined on the basis of a specific item being offered. The determination is based on whether or not the government’s requirement can be met by an item *of a type* available in the market. A quick example: a five drawer file cabinet that the government typically purchased with a government-unique specification. Market research establishes that filing cabinets exist in the commercial marketplace. You have a requirement that can be met by an item *of a type* customarily used for nongovernmental purposes. The new FAR commercial items procedures shall be used.

So, if market research determines that the Government’s requirement could be satisfied by an item *of a type* that has been sold, or offered for sale, and so forth, in the commercial market, then the Government requirement is, by definition, a requirement for a commercial item. As a result, any item that is offered to the government that can satisfy the requirements of the solicitation is a “commercial item.”

DEFINITION OF COMMERCIAL ITEMS (CONTINUED)

- Some support services.
- Other services, if *of a type* offered and sold competitively in the marketplace.
- Items developed exclusively at private expense and sold in substantial quantities, on a competitive basis, to multiple State and local governments.

Viewgraph D-1c

2. The definition of commercial items even includes services:
 - **Support Services:** First, the definition includes services procured for support of a commercial item such as, installation services, maintenance services, repair services, training services, and other services. **There are two caveats attached to support services. The source of the support services must offer –**
 - (a) **The services to the general public and the Federal Government contemporaneously and under similar terms and conditions; and**
 - (b) **To use the same work force for providing the Federal Government with such services as the source uses for providing such services to the general public.**

Let's try to apply this definition. As we have seen, the definition of commercial items is applied when market research is conducted. We're looking for support services for a commercial item that the government has either purchased or intends to purchase. Let's take any of the support services listed in the definition. Let's take maintenance services. Remember, however, here too the definition is as broad as can be, including "other services" in support of a commercial item. Using the example of maintenance services, we find that, sure enough, there are firms that offer such services for the commercial items we're acquiring. Now let's apply the two caveats—

Does the source of the support services offer the services to the general public and the Federal Government contemporaneously and under similar terms and conditions? What we're getting at here is whether the services are commercial or government unique. Say we're looking at maintenance services for a specific type of vehicle. The vehicle happened to be of a type customarily used for nongovernmental purposes and had been sold, leased, or licensed to the general public. In fact, it was pretty much your basic truck. But now you find there aren't any companies that offer to maintain these trucks for the government contemporaneously with their commercial business, nor will they offer to do so and under similar terms and conditions. This may be because the use to which the government puts the vehicle is unique, or perhaps the location the government requires the maintenance is unique (these

services aren't offered commercially in Antarctica). Whatever the reason, market research establishes that no firm appears to be offering the type of maintenance the government requires in the marketplace using their standard terms and conditions.

The second question is whether the source of the support services offers to use the same workforce for providing the Federal Government with the services as the source uses for providing support services to the general public. Let's stay with the trucks. If you couldn't find any companies that would maintain these trucks for the government contemporaneously with their commercial business under similar terms and conditions, it follows that none would be likely to use the same workforce for providing support services to the government and the commercial customers. If government usage of the commercial item is unique, or again, the location the government requires the maintenance is unique, requiring different skills and a different workforce, these services are government unique services in support of a commercial item.

Sorry to use negative examples. Most support services of commercial items would probably meet the FAR definition of commercial items. So it's important that we try to envision what limitations or exclusions are intended by the caveats attached to the definition. Basically, we want to ensure that government unique services in support of a commercial item are not procured using the government's simplified commercial procedures. The caveats that the source of the support services must offer the services to the general public and the Federal Government contemporaneously under similar terms and conditions; and use the same work force for providing the Federal Government with such services as the source uses for providing such services to the general public should be considered indicators of whether or not the support services are, in fact, government unique.

OTHER SERVICES

Services of a type offered and sold competitively in substantial quantities in the commercial marketplace based on established catalog or market prices for specific tasks performed under standard commercial terms and conditions

Viewgraph D-2

- **Other Services:** Now these services need not be related to a commercial item in any way. These are simply services that are performed in the commercial marketplace. There are a few limitations: 1) The services must be *of a type* offered and sold competitively in substantial quantities in the commercial marketplace. In this case, finding somebody through the internet up on Hudson Bay that appears to offer the type of service the government needs does not make it a commercial service. **The FAR requires that the service be of a type offered and sold competitively in substantial quantities.** Market research should quickly establish whether the service is offered and sold in substantial quantities and whether it is sold competitively. **A service provided by a sole source in the commercial market will not meet the definition.** Remember: these limitations *do not apply* to the support services we discussed previously.

The second limitation is that these services must be offered and sold based on established catalog or market prices for specific tasks performed. This is somewhat difficult to get your arms around in the case of services. Let's look at a couple of common examples. First, there is automotive repair - a service we all enjoy procuring in our personal lives. Automotive repairs are generally priced at standard rates for specific tasks performed. A tune-up for a certain make and model of vehicle has a specific catalog price. This would meet the criteria that services are offered and sold based on established catalog or market prices for specific tasks performed.

Another example would be services that are priced based on factors applied to a standard estimating guide such as *Means Pricing Guide* which is used by commercial contractors to price construction jobs. Any pricing approach that is based on an established price for a specific task performed should meet this test.

The final limitation is that these services must be offered and sold in the marketplace under standard commercial terms and conditions. We've all ready discussed standard terms and conditions and we'll be talking about them further because they are critical to contracting for commercial items and services. In the case of the limitation we're looking at here, a service must be sold in the market on standard terms. This would require that the terms under which the services are sold be relatively fixed and not so variable or negotiable as to obscure the presence of any standard at all.

Determine whether to solicit offers using FAR Part 12 based on information provided by market research.

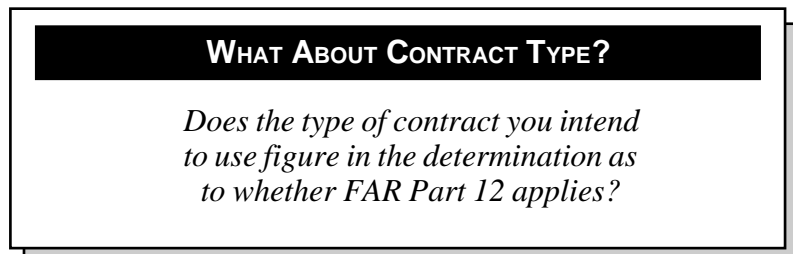
Viewgraph D-3

3. Evaluate requirements and using information obtained through market research —
 - a. Determine if commercial items are available to —
 - (1) Meet requirements;
 - (2) Could be modified to meet requirements; or
 - (3) Could meet requirements if requirements are modified to a reasonable extent;
 - b. Determine the extent to which commercial items could be incorporated at the component level;

As we just saw, if market research determines that the Government's requirement could be satisfied by an item or service *of a type* available in the commercial market, then the Government requirement is, by definition, a requirement for a commercial item. FAR Part 10.002(d) requires that the contracting officer to solicit and award any resultant contract using the policies and procedures in Part 12. If market research establishes that the Government's need cannot be met by an item or service *of a type* available in the commercial market, then FAR Part 12 shall not be used. Again, any item offered to the government that can satisfy the requirements of a Part 12 solicitation is, by definition, a "commercial item" because the offered item is *of a type* available in the marketplace.

Related Standards

- a. **Mandatory use** – If market research establishes that the Government’s need may be met by a type of item or service customarily available in the commercial market place.
- b. **Shall not be used** – If market research establishes that the Government’s need cannot be met by a type of item or service customarily available in the market place.
- c. **Determination is made prior to soliciting offers and WITHOUT asking prospective offerors to certify that their items are “commercial.”**



Viewgraph D-4

- 4. Does the type of contract you intend to use figure in the determination of whether FAR Part 12 applies? **The answer to that question is no.** FAR Part 12 is used if market research establishes that the agency need can be met by a commercial item or service. Some of you who have been reading ahead might be thinking that Part 12 requires that a fixed price contract be used and our agency always uses cost-type contracts for maintenance services. The answer is this: Maintenance services for a commercial item are clearly called out as a service that is acquired under FAR Part 12. FAR Part 12 shall be used and the contract type restriction in FAR Part 12.207, which is statutory, applies. **This is probably the most difficult aspect of FASA and the commercial items rule.** Consider using a flexible fixed-price contract such as a labor hour contract with a fixed-price schedule for materials, or a task order contract where each order will be fixed priced.

**DETERMINE WHETHER TO USE COMMERCE BUSINESS
DAILY NOTE 26**

If market research establishes that the Government's need cannot be met by a type of item or service customarily available in the market place, Commerce Business Daily Note 26 must be in synopsis.

Viewgraph D-5

5. This one is easy. If market research establishes that the Government's need cannot be met by a type of item or service customarily available in the market, FAR Part 10.002(d) requires Commerce Business Daily Note 26 to appear in the synopsis, if a synopsis is required for the procurement.

***Requirement to Restructure a Solicitation
as a result of a Response to Numbered
Note 26***

Viewgraph D-6

6. Now here's the hard part. Market research failed to locate any item or service of a type that met the government's needs. **The synopsis included Numbered Note 26 advising prospective offerors that the Government does not intend to use Part 12 for the acquisition** [FAR 5.207(e)(4)]. What does the contracting officer do when the ABC company responds, prior to release of the solicitation, advising that they offer a product in the marketplace that they believe could meet the government's needs?

There are several possible choices here. Let's see if we can arrive at a logical choice through the process of elimination. What are our choices?

- One choice is to ignore the ABC company's response and release the solicitation as originally intended. This would probably lead to a protest, which we would lose because our solicitation would neither be consistent with statute or regula-

tion. If we're buying an item that meets the definition of commercial item – Part 12 is required, not an option.

- We can review the ABC company's product information and decide whether it can or cannot meet the government's needs and decide whether to restructure the solicitation based on that determination. This choice sounds reasonable, except we seem to be pre-evaluating ABC's product. Our little evaluation is not based on evaluation criteria or a formal offer - its based on whatever form the communication from ABC company took.
- There are at least two more options – although perhaps you can think of more. There is the possibility that your market research already identified ABC's products and they simply don't meet the requirements. This is something that may not be apparent from the synopsis but would be from the solicitation. In this case, you may be comfortable proceeding as planned. You have sufficient documentation that you were aware of ABC's products and have a reasonable basis for determining this is not a commercial item solicitation.
- The last option is the case where you were totally unaware of ABC company and their products. In this case, the new information from ABC company really indicates that their may be a commercial product available and your market research probably was not thorough enough to form the basis for determining whether to use a commercial item solicitation. In this case, you should recognize that you are not ready to release a solicitation and go back to the first step. Perform the necessary market research.

USING THE CLAUSE AT FAR 52.244-6

- If FAR Part 12 does not apply, the resulting solicitation and contract shall include the clause at FAR 52.244-6.
- Contractors are required to include the terms of the clause in all subcontracts awarded under the contract.

Viewgraph D-7

7. This is a mandatory clause that must be included in all government solicitations and contracts that do not use FAR Part 12. This clause implements two FASA requirements.
 - (1) This clause requires the contractor, to the maximum extent practicable, to incorporate and require its subcontractors at all tiers to incorporate commercial items or nondevelopmental items as components of items to be supplied under the contract.
 - (2) The clause states that the contractor is not required to include in any subcontract awarded under the contract, any FAR provision or clause, other than (FAR Part 15 clauses) and
 - 52.222-26, Equal Opportunity (E.O. 11246);
 - 52.222-35, Affirmative Action for Special Disabled and Vietnam Era Veterans (38 U.S.C. 2012(a)); and
 - 52.222-36, Affirmative Action for Handicapped Workers (29 U.S.C. 793).

Remember, if you are not using a Part 12 solicitation or contract, the clause at FAR 52.244-6 must appear in your solicitation and contract. We can be sure our friends in industry will help us to remember to include this clause in their prime contracts.

PART 2

DEFINITIONS OF WORDS AND TERMS

2.000 Scope of part.

This part defines words and terms commonly used in this regulation. Other terms are defined in the part or subpart with which they are particularly associated (see the Index for locations).

SUBPART 2.1—DEFINITIONS

2.101 Definitions.

As used throughout this regulation, the following words and terms are used as defined in this subpart unless (a) the context in which they are used clearly requires a different meaning or (b) a different definition is prescribed for a particular part or portion of a part.

“Acquisition” means the acquiring by contract with appropriated funds of supplies or services (including construction) by and for the use of the Federal Government through purchase or lease, whether the supplies or services are already in existence or must be created, developed, demonstrated, and evaluated. Acquisition begins at the point when agency needs are established and includes the description of requirements to satisfy agency needs, solicitation and selection of sources, award of contracts, contract financing, contract performance, contract administration, and those technical and management functions directly related to the process of fulfilling agency needs by contract.

“Affiliates” means associated business concerns or individuals if, directly or indirectly, (a) either one controls or can control the other or (b) a third party controls or can control both.

“Agency head” (see “head of the agency”).

“Commercial component” means any component that is a commercial item.

“Commercial item” means—

(a) Any item, other than real property, that is of a type customarily used for nongovernmental purposes and that—

(1) Has been sold, leased, or licensed to the general public; or,

(2) Has been offered for sale, lease, or license to the general public;

(b) Any item that evolved from an item described in paragraph (a) of this definition through advances in technology or performance and that is not yet available in the

commercial marketplace, but will be available in the commercial marketplace in time to satisfy the delivery requirements under a Government solicitation;

(c) Any item that would satisfy a criterion expressed in paragraphs (a) or (b) of this definition, but for—

(1) Modifications of a type customarily available in the commercial marketplace; or

(2) Minor modifications of a type not customarily available in the commercial marketplace made to meet Federal Government requirements. “Minor” modifications means modifications that do not significantly alter the nongovernmental function or essential physical characteristics of an item or component, or change the purpose of a process. Factors to be considered in determining whether a modification is minor include the value and size of the modification and the comparative value and size of the final product. Dollar values and percentages may be used as guideposts, but are not conclusive evidence that a modification is minor;

(d) Any combination of items meeting the requirements of paragraphs (a), (b), (c), or (e) of this definition that are of a type customarily combined and sold in combination to the general public;

(e) Installation services, maintenance services, repair services, training services, and other services if such services are procured for support of an item referred to in paragraphs (a), (b), (c), or (d) of this definition, and if the source of such services—

(1) Offers such services to the general public and the Federal Government contemporaneously and under similar terms and conditions; and

(2) Offers to use the same work force for providing the Federal Government with such services as the source uses for providing such services to the general public;

(f) Services of a type offered and sold competitively in substantial quantities in the commercial marketplace based on established catalog or market prices for specific tasks performed under standard commercial terms and conditions. This does not include services that are sold based on hourly rates without an established catalog or market price for a specific service performed;

(g) Any item, combination of items, or service referred to in paragraphs (a) through (f), notwithstanding the fact that the item, combination of items, or service is transferred between or among separate divisions, subsidiaries, or affiliates of a contractor; or

FAC 90—32 OCTOBER 1, 1995

2.101

FEDERAL ACQUISITION REGULATION (FAR)

(h) A nondevelopmental item, if the procuring agency determines the item was developed exclusively at private expense and sold in substantial quantities, on a competitive basis, to multiple State and local governments.

“Component” means any item supplied to the Federal Government as part of an end item or of another component.

“Contract” means a mutually binding legal relationship obligating the seller to furnish the supplies or services (including construction) and the buyer to pay for them. It includes all types of commitments that obligate the Government to an expenditure of appropriated funds and that, except as otherwise authorized, are in writing. In addition to bilateral instruments, contracts include (but are not limited to) awards and notices of awards; job orders or task letters issued under basic ordering agreements; letter contracts; orders, such as purchase orders, under which the contract becomes effective by written acceptance or performance; and bilateral contract modifications. Contracts do not include grants and cooperative agreements covered by 31 U.S.C. 6301, et seq. For discussion of various types of contracts, see Part 16.

“Contract administration office” means an office that performs (a) assigned postaward functions related to the administration of contracts and (b) assigned preaward functions.

“Contracting” means purchasing, renting, leasing, or otherwise obtaining supplies or services from nonfederal sources. Contracting includes description (but not determination) of supplies and services required, selection and solicitation of sources, preparation and award of contracts, and all phases of contract administration. It does not include making grants or cooperative agreements.

“Contracting activity” means an element of an agency designated by the agency head and delegated broad authority regarding acquisition functions.

“Contracting office” means an office that awards or executes a contract for supplies or services and performs postaward functions not assigned to a contract administration office.

“Contracting officer” means a person with the authority to enter into, administer, and/or terminate contracts and make related determinations and findings. The term includes certain authorized representatives of the contracting officer acting within the limits of their authority as delegated by the contracting officer. “Administrative contracting officer (ACO)” refers to a contracting officer who is administering contracts. “Termination contracting officer (TCO)” refers to a contracting officer who is settling terminated contracts. A single contracting officer may be responsible for duties in any or all of these areas. Reference in this regulation to administrative contracting officer or termination contracting officer does not (a) require that a duty be performed at a particular office or

activity or (b) restrict in any way a contracting officer in the performance of any duty properly assigned.

“Day” means, unless otherwise specified, a calendar day.

“Executive agency” means an executive department, a military department, or any independent establishment within the meaning of 5 U.S.C. 101, 102, and 104(1), respectively, and any wholly owned Government corporation within the meaning of 31 U.S.C. 9101.

“Facsimile” means electronic equipment that communicates and reproduces both printed and handwritten material. If used in conjunction with a reference to a document; e.g., facsimile bid, the term refers to a document (in the example given, a bid) that has been transmitted to and received by the Government via facsimile.

“Federal agency” means any executive agency or any independent establishment in the legislative or judicial branch of the Government (except the Senate, the House of Representatives, the Architect of the Capitol, and any activities under the Architect’s direction).

“Head of the agency” (also called “agency head”) means the Secretary, Attorney General, Administrator, Governor, Chairperson, or other chief official of an executive agency, unless otherwise indicated, including any deputy or assistant chief official of an executive agency; and the term “authorized representative” means any person, persons, or board (other than the contracting officer) authorized to act for the head of the agency or Secretary.

“Head of the contracting activity” includes the official who has overall responsibility for managing the contracting activity.

“In writing” or “written” means any worded or numbered expression which can be read, reproduced, and later communicated, and includes electronically transmitted and stored information.

“Market research” means collecting and analyzing information about capabilities within the market to satisfy agency needs.

“May” denotes the permissive. However, the words “no person may . . .” mean that no person is required, authorized, or permitted to do the act described.

“National defense” means any activity related to programs for military or atomic energy production or construction, military assistance to any foreign nation, stockpiling, or space.

“Nondevelopmental item” means—

(a) Any previously developed item of supply used exclusively for governmental purposes by a Federal agency, a State or local government, or a foreign government with which the United States has a mutual defense cooperation agreement;

(b) Any item described in paragraph (a) of this definition that requires only minor modification or modifications of a type customarily available in the commercial market-

FAC 90—32 OCTOBER 1, 1995

PART 2—DEFINITIONS OF WORDS AND TERMS

2.201

place in order to meet the requirements of the procuring department or agency; or

(c) Any item of supply being produced that does not meet the requirements of paragraph (a) or (b) solely because the item is not yet in use.

“Offer” means a response to a solicitation that, if accepted, would bind the offeror to perform the resultant contract. Responses to invitations for bids (sealed bidding) are offers called “bids” or “sealed bids;” responses to requests for proposals (negotiation) are offers called “proposals;” responses to requests for quotations (negotiation) are *not* offers and are called “quotes.” For unsolicited proposals, see Subpart 15.5.

“Possessions” includes the Virgin Islands, Johnston Island, American Samoa, Guam, Wake Island, Midway Island, and the guano islands, but does not include Puerto Rico, leased bases, or trust territories.

“Senior procurement executive” means the individual appointed pursuant to section 16(3) of the Office of Federal Procurement Policy Act (41 U.S.C. 414(3)) who is responsible for management direction of the acquisition system of the executive agency, including implementation of the unique acquisition policies, regulations, and standards of the executive agency.

“Shall” denotes the imperative.

“Signature” or “signed” means the discrete, verifiable

symbol of an individual which, when affixed to a writing with the knowledge and consent of the individual, indicates a present intention to authenticate the writing. This includes electronic symbols.

“Supplies” means all property except land or interest in land. It includes (but is not limited to) public works, buildings, and facilities; ships, floating equipment, and vessels of every character, type, and description, together with parts and accessories; aircraft and aircraft parts, accessories, and equipment; machine tools; and the alteration or installation of any of the foregoing.

“United States,” when used in a geographic sense, means the 50 States and the District of Columbia.

SUBPART 2.2—DEFINITIONS CLAUSE

2.201 Contract clause.

The contracting officer shall insert the clause at 52.202-1, Definitions, in solicitations and contracts except when the contract is not expected to exceed the simplified acquisition threshold in Part 13. If the contract is for personal services, construction, architect-engineer services, or dismantling, demolition, or removal of improvements, the contracting officer shall use the clause with its Alternate I. Additional definitions may be included, provided they are consistent with the clause and the FAR.

FAC 90—32 OCTOBER 1, 1995

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

52.245-2

“Commercial item”, as used in this clause, has the meaning contained in the clause at 52.202-1, Definitions.

“Subcontract”, as used in this clause, includes a transfer of commercial items between divisions, subsidiaries, or affiliates of the Contractor or subcontractor at any tier.

(b) To the maximum extent practicable, the Contractor shall incorporate, and require its subcontractors at all tiers to incorporate, commercial items or nondevelopmental items as components of items to be supplied under this contract.

(c) Notwithstanding any other clause of this contract, the Contractor is not required to include any FAR provision or clause, other than those listed below to the extent they are applicable and as may be required to establish the reasonableness of prices under Part 15, in a subcontract at any tier for commercial items or commercial components:

(1) 52.222-26, Equal Opportunity (E.O. 11246);

(2) 52.222-35, Affirmative Action for Special Disabled and Vietnam Era Veterans (38 U.S.C. 4212(a));

(3) 52.222-36, Affirmative Action for Handicapped Workers (29 U.S.C. 793); and

(4) 52.247-64, Preference for Privately-Owned U.S.-Flagged Commercial Vessels (46 U.S.C. 1241)(flow down not required for subcontracts awarded beginning May 1, 1996).

(d) The Contractor shall include the terms of this clause, including this paragraph (d), in subcontracts awarded under this contract.

(End of clause)

52.244-6 Subcontracts for Commercial Items and Commercial Components.

As prescribed in 44.403, insert the following clause:

SUBCONTRACTS FOR COMMERCIAL ITEMS
AND COMMERCIAL COMPONENTS (OCT 1995)

(a) Definition.

52-211

SECTION E

The Standard FAR Part 12 Clauses

Informal Lecture and viewgraphs and practical exercise.

(45 minutes)

Learning Objective: By the end of this section, each student will be able to describe the FAR Part 12 clauses and their contents.

1. There are two clauses that appear in a Part 12 contract for commercial items. One clause is **FAR 52.212-5, Contract Terms and Conditions Required to Implement Statutes or Executive Orders – Commercial Items**. This clause contains statutory requirements that the contracting officer may incorporate into the contract simply by indicating in the clause that they apply. FAR 52.212-5 must be attached to the contract. The prescriptions for these clauses appear in the appropriate sections of the FAR.

***Limitation on contractor requirement to
flow government clauses down to
subcontractors providing com-
mercial components***

Viewgraph E-1

The clause at 52.212-5 limits the flowdown of government contract clauses to subcontractors. Contractors are not required to include any FAR clause, other than those listed below, in subcontracts for commercial items or commercial components —

- (1) 52.222-26, Equal Opportunity (E.O. 11246);
 - (2) 52.222-35, Affirmative Action for Special Disabled and Vietnam Era Veterans (38 U.S.C. 2012(a)); and
 - (3) 52.222-36, Affirmative Action for Handicapped Workers (29 U.S.C. 793).
2. We're now going to look more closely at the clause **at FAR 52.212-4, Standard Terms and Conditions – Commercial items**. Although the standard terms and conditions contained in this clause are largely based on commercial practices, several **DO**

NOT DIFFER IN SUBSTANCE from FAR policies and procedures—

- **Assignment.** FAR 52.212-4(b) *Assignment*. The Contractor or its assignee's rights to be paid amounts due as a result of performance of this contract, may be assigned to a bank, trust company, or other financing institution, including any Federal lending agency in accordance with the Assignment of Claims Act (31 U.S.C. 3727).
- **Disputes.** FAR 52.212-4(d) *Disputes*. This contract is subject to the Contract Disputes Act of 1978, as amended (41 U.S.C. 601-613). Failure of the parties to this contract to reach agreement on any request for equitable adjustment, claim, appeal, or action arising under or relating to this contract shall be a dispute to be resolved in accordance with the clause at FAR 52.233-1, Disputes, which is incorporated herein by reference. The Contractor shall proceed diligently with performance of this contract, pending final resolution of any dispute arising under the contract.
- **Definitions.** FAR 52.212-4 (e) *Definitions*. The clause at FAR 52.202-1, Definitions, is incorporated herein by reference.
- **Invoice.** FAR 52.212-4(g) *Invoice*. The Contractor shall submit an original invoice and three copies (or electronic invoice, if authorized) to the address designated in the contract to receive invoices. An invoice must include—
 - (1) Name and address of the Contractor;
 - (2) Invoice date;
 - (3) Contract number, contract line item number and, if applicable, the order number;
 - (4) Description, quantity, unit of measure, unit price and extended price of the items delivered;
 - (5) Shipping number and date of shipment including the bill of lading number and weight of shipment if shipped on Government bill of lading;
 - (6) Terms of any prompt payment discount offered;
 - (7) Name and address of official to whom payment is to be sent; and

- (8) Name, title, and phone number of person to be notified in event of a defective invoice.

Invoices will be handled in accordance with the Prompt Payment Act (31 U.S.C. 3903) and Office of Management and Budget (OMB) Circular A-125, Prompt Payment.

- **Payment.** FAR 52.212-4(i) *Payment.* Payment shall be made for items accepted by the Government that have been delivered to the delivery destinations set forth in this contract. The Government will make payment in accordance with the Prompt Payment Act (31 U.S.C. 3903) and Office of Management and Budget (OMB) Circular A-125, Prompt Payment. Payments under this contract may be made by the Government either by check, electronic funds transfer, or the Automated Clearing House, at the option of the Government.
 - **Discounts.** FAR 52.212-4(I) *Payment.* In connection with any discount offered for early payment, time shall be computed from the date of the invoice. For the purpose of computing the discount earned, payment shall be considered to have been made on the date which appears on the payment check or the date on which an electronic funds transfer was made.
 - **Title.** FAR 52.212-4(n) *Title.* Unless specified elsewhere in this contract, title to items furnished under this contract shall pass to the Government upon acceptance, regardless of when or where the Government takes physical possession.
 - **Risk of Loss.** FAR 52.212-4(j) *Risk of loss.* Unless the contract specifically provides otherwise, risk of loss or damage to the supplies provided under this contract shall remain with the Contractor until, and shall pass to the Government upon:
 - (1) Delivery of the supplies to a carrier, if transportation is f.o.b. origin; or
 - (2) Delivery of the supplies to the Government at the destination specified in the contract, if transportation is f.o.b. destination.
3. **Some statutory requirements that a contractor must comply with are simply listed in a section entitled Compliance with Laws Unique to Government Contracts.** These include –

**COMPLIANCE WITH LAWS UNIQUE TO GOVERNMENT
CONTRACTS**

- 31 U.S.C. 1352 Use of appropriated funds to influence certain Federal contracts
- 18 U.S.C. 431 relating to officials not to benefit
- 40 U.S.C 327 et seq., Contract Work Hours and Safety Standards Act

Viewgraph E-2a

**COMPLIANCE WITH LAWS UNIQUE TO GOVERNMENT
CONTRACTS (CONTINUED)**

- 41 U.S.C. 51-58 Anti-Kickback Act of 1986
- 41 U.S.C. 251 related to whistle blower protections
- 49 U.S.C 40118 Fly American Act

Viewgraph E-2b

4. There are also some Terms and Conditions in FAR 52.212-4 **THAT DIFFER IN SUBSTANCE** from FAR policies and procedures, although this may not be apparent from a quick read.

- **Patent Indemnity.** FAR 52.212-4(h) *Patent indemnity.* The Contractor shall indemnify the Government and its officers, employees and agents against liability, including costs, for actual or alleged direct or contributory infringement of, or inducement to infringe, any United States or foreign patent, trademark or copyright, arising out of the performance of this contract, provided the Contractor is reasonably notified of such claims and proceedings.

The clause at FAR 52.227-3 does not include foreign patents and contains exclusions that do not appear in a FAR Part 12 contract.

- **Taxes.** FAR 52.212-4(k) *Taxes*. The contract price includes all applicable Federal, State, and local taxes and duties.

Although generally consistent with FAR clauses, taxes are sometimes excluded from the price of Federal contracts.

- **Termination for Convenience**
- **Termination for Cause**
- **Excusable Delays**

Terminations under a Part 12 contract differ substantially from standard FAR procedures. Part 12 terminations will be discussed at length tomorrow.

- **Inspection**
- **Acceptance**
- **Warranty**

Inspection, Acceptance and Warranty terms for a FAR Part 12 contract also differ substantially from standard FAR procedures. Inspection, Acceptance, and Warranty will be discussed as soon as we finish looking at the remainder of the terms and conditions in the clause at 52.212-4.

5. Although certificates of compliance are no longer required for commercial items, contractors must comply with the Clean Air and Water Acts and the Contract Work Hours and Safety Standards Act. In addition, contractors do NOT have to require their employees individually certify that they are (1) familiar with the Procurement Integrity Act and (2) will report violations of the Act.

PROCUREMENT INTEGRITY ACT

Contractors do NOT have to require their employees individually certify that they are (1) familiar with the Procurement Integrity Act and (2) will report violations of the Act.

Viewgraph E-2c

6. **The standard terms do not permit unilateral changes to commercial item contracts.**

- Contracts which include the clause at FAR 52-212-4 do **NOT** authorize unilateral changes (unless tailored to provide for such changes where consistent with commercial practice).
- The clause only allows bilateral agreements.
- Changes in the terms and conditions of the contract must be made only by written agreement of the parties.

7. Changes or modifications initiated by the government:

- Must be clearly defined and written
- Modification only to be issued as a bilateral agreement
- Must provide contractor a reasonable response time to prepare and submit price and schedule proposal and complete negotiations.

8. Changes or modifications initiated by the contractor

- Must be clearly defined and written
- Must provide government a reasonable response time to evaluate change and ensure contract performance requirements will be met or exceeded.
- Government must perform cost impact analysis and obtain necessary signatures
- Government must issue bilateral modification prior to contractor initiating change.

9. Pricing Changes

NOTE: Section 4201 of the Federal Acquisition Reform Act of 1995 provides an exception to the Truth in Negotiations Act for “the acquisition of a commercial item.” This provision will eliminate all cost or pricing data requirements for commercial items.

- a. When a contract is priced using the exceptions at FAR 15.804-1(a)(1), no cost or pricing data may be obtained for modifica-

tions unless the proposed modification would change the contract from a contract for a commercial item to a contract for other than a commercial item (see 15.804-1(b)(6)).

- b. If the exceptions at FAR 15.804-1(a)(1) are not applicable, the contracting officer may be required to obtain cost or pricing data to determine the reasonableness of prices for subsequent modifications (see 15.804-2(a)(1) and the contracting officer shall insert the provisions and clauses prescribed for this purpose in an addendum to the solicitation and contract. In particular, FAR 15.106-2 requires flowdown of the clause at 52.215-43, Audit - Commercial Items, for incorporation in subcontracts covered by the commercial item exception.

Example: Government has executed a contract to have the contractor deliver one (1) Model 4949, housing trailer fully furnished which contains 3-bedrooms, 2 baths, 1 kitchen, 1 dining room, and 1 living room. The negotiated value of this unit is \$45,000 with delivery 90 days after contract award. The seller has received announcement of an upgrade to Model 4949 for a slight increase in cost. The upgraded model, 4949A offers one additional bath and an 8'x10' den. New cost is \$47,000 and delivery can be made in 100 days. Seller believes upgrade will fully meet government requirements and space specifications and proposes a change/modification to the existing contract.

- a. Treat change/modification cost proposals in similar manner as an original proposal (i.e., prepare cost analysis for delta cost and schedule impact and determine cost/price realism and reasonableness).
- b. When cost or pricing data are not required because an action is at or below the cost or pricing data threshold, the FAR requires contracting officers to request, as a minimum, "appropriate information on the prices and quantities at which the same or similar items have previously been sold, that is adequate for evaluating the reasonableness of the proposed price. Cost information may also be required. For example, cost information might be necessary to support an analysis of material costs" (when sufficient information on labor and overhead rates is already available).
- c. Contractors can use the SF 1448 as a cover sheet in submitting required information for determining price reasonableness for

actions under the cost or pricing data threshold. Information submitted by contractors with this form is NOT considered cost or pricing data and shall NOT be certified in accordance with FAR 15.804-4.

10. The Order of Precedence

The following is the order of precedence language from FAR 52.212-4(s):

Order of Precedence. Any inconsistencies in this solicitation or contract shall be resolved by giving precedence in the following order: (a) the schedule of supplies/services; (b) the Assignments, Disputes, Payments, Invoice, Other Compliances, and Compliance with Laws Unique to Government Contracts paragraphs of this clause; (c) the clause at 52.212-5; (d) addenda to this solicitation or contract including any license agreements for computer software; (e) solicitation provisions if this is a solicitation; (f) other paragraphs of this clause; (g) the Standard Form 1449; (h) Other documents, exhibits, and attachments; and (i) the specification.

- In order to understand how the order of precedence section of the clause at FAR 52.212-4 works, let's consider a contract for software, which was purchased on the standard commercial license agreement. The agreement was properly included as an addendum to the contract. Let's read the agreement.

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7. **LIMITED WARRANTY.** JASC warrants the media on which the SOFTWARE is furnished to be free of defects in material and workmanship, under normal use, for a period of ninety (90) days following the date of delivery to you. In the event of defects, JASC's sole liability shall be to replace the defective media which has been returned to JASC or the supplier with your dated invoice and is shown to be defective. In the event that JASC is unable to replace defective media, JASC shall refund your money upon your termination of this license.

8. **DISCLAIMER OF WARRANTIES.** JASC DISCLAIMS ALL OTHER WARRANTIES, EXPRESS OR IMPLIED, INCLUDING, BUT NOT LIMITED TO, ANY IMPLIED WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE.

9. **JASC SHALL NOT BE LIABLE FOR ANY DIRECT, INDIRECT, CONSEQUENTIAL OR INCIDENTAL DAMAGES (INCLUDING DAMAGES FOR LOSS OF BUSINESS PROFITS, BUSINESS INTERRUPTION, LOSS OF BUSINESS INFORMATION, AND THE LIKE) ARISING OUT OF THE USE OR INABILITY TO USE THE PRODUCT EVEN IF JASC HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES.**

10. **Should any other warranties be found to exist, such warranties shall be limited in duration to ninety (90) days following the date of delivery to you. In no event will JASC's liability for any damages to you or any other person exceed the amount paid for the license to use the SOFTWARE.**

11. **This License shall be governed and construed in accordance with the laws of the State of Minnesota and shall benefit JASC, its successors and assigns.**

Now let's consider a case where the contractor alleges that the user installed the software on several computers without obtaining a Site License. The contractor has sent the contracting officer a notice that the license has been terminated in accordance with paragraph 5 of the license agreement and the government is ordered to destroy the written materials and all copies of the software, including modified copies, if any.

Now let's look at the "Order of Precedence" paragraph of the clause at 52.212-4 and try to answer the following questions:

1. What action would you suggest the contracting officer take?
2. Assuming the allegation is true, does the contractor have the right to terminate the contract under paragraph 5 of the license?
3. Is the government required to destroy the software?

Now, let's look at the case where the contracting officer determines the contractor's allegation is false.

1. What action would you suggest the contracting officer take?
2. If the contractor persists, how should the matter be resolved?
3. Bonus Question: When the matter is adjudicated, what law will most likely govern?
 - a. The Federal Acquisition Regulation
 - b. Federal Procurement Law
 - c. The laws of the state of Minnesota
 - d. The Uniform Commercial Code
 - e. All of the Above
 - f. None of the Above.

FAC 90—32 OCTOBER 1, 1995

52.212-4

FEDERAL ACQUISITION REGULATION (FAR)

requirements of this contract. The Government reserves the right to inspect or test any supplies or services that have been tendered for acceptance. The Government may require repair or replacement of nonconforming supplies or reperformance of nonconforming services at no increase in contract price. The Government must exercise its post-acceptance rights (1) within a reasonable time after the defect was discovered or should have been discovered; and (2) before any substantial change occurs in the condition of the item, unless the change is due to the defect in the item.

(b) *Assignment.* The Contractor or its assignee's rights to be paid amounts due as a result of performance of this contract, may be assigned to a bank, trust company, or other financing institution, including any Federal lending agency in accordance with the Assignment of Claims Act (31 U.S.C. 3727).

(c) *Changes.* Changes in the terms and conditions of this contract may be made only by written agreement of the parties.

(d) *Disputes.* This contract is subject to the Contract Disputes Act of 1978, as amended (41 U.S.C. 601-613). Failure of the parties to this contract to reach agreement on any request for equitable adjustment, claim, appeal or action arising under or relating to this contract shall be a dispute to be resolved in accordance with the clause at FAR 52.233-1, Disputes, which is incorporated herein by reference. The Contractor shall proceed diligently with performance of this contract, pending final resolution of any dispute arising under the contract.

(e) *Definitions.* The clause at FAR 52.202-1, Definitions, is incorporated herein by reference.

(f) *Excusable delays.* The Contractor shall be liable for default unless nonperformance is caused by an occurrence beyond the reasonable control of the Contractor and without its fault or negligence such as, acts of God or the public enemy, acts of the Government in either its sovereign or contractual capacity, fires, floods, epidemics, quarantine restrictions, strikes, unusually severe weather, and delays of common carriers. The Contractor shall notify the Contracting Officer in writing as soon as it is reasonably possible after the commencement of any excusable delay, setting forth the full particulars in connection therewith, shall remedy such occurrence with all reasonable dispatch, and shall promptly give written notice to the Contracting Officer of the cessation of such occurrence.

(g) *Invoice.* The Contractor shall submit an original invoice and three copies (or electronic invoice, if authorized,) to the address designated in the contract to receive invoices. An invoice must include—

- (1) Name and address of the Contractor;
- (2) Invoice date;
- (3) Contract number, contract line item number and, if applicable, the order number;
- (4) Description, quantity, unit of measure, unit price and extended price of the items delivered;

**52.212-4 Contract Terms and Conditions —
Commercial Items.**

As prescribed in 12.301(b)(3), insert the following clause:

**CONTRACT TERMS AND CONDITIONS—
COMMERCIAL ITEMS (OCT 1995)**

(a) *Inspection/Acceptance.* The Contractor shall only tender for acceptance those items that conform to the 52-30.4

FAC 90—32 OCTOBER 1, 1995

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

52.212-4

(5) Shipping number and date of shipment including the bill of lading number and weight of shipment if shipped on Government bill of lading;

(6) Terms of any prompt payment discount offered;

(7) Name and address of official to whom payment is to be sent; and

(8) Name, title, and phone number of person to be notified in event of defective invoice.

Invoices will be handled in accordance with the Prompt Payment Act (31 U.S.C. 3903) and Office of Management and Budget (OMB) Circular A-125, Prompt Payment.

(h) *Patent indemnity.* The Contractor shall indemnify the Government and its officers, employees and agents against liability, including costs, for actual or alleged direct or contributory infringement of, or inducement to infringe, any United States or foreign patent, trademark or copyright, arising out of the performance of this contract, provided the Contractor is reasonably notified of such claims and proceedings.

(i) *Payment.* Payment shall be made for items accepted by the Government that have been delivered to the delivery destinations set forth in this contract. The Government will make payment in accordance with the Prompt Payment Act (31 U.S.C. 3903) and Office of Management and Budget (OMB) Circular A-125, Prompt Payment. Payments under this contract may be made by the Government either by check, electronic funds transfer, or the Automated Clearing House, at the option of the Government. In connection with any discount offered for early payment, time shall be computed from the date of the invoice. For the purpose of computing the discount earned, payment shall be considered to have been made on the date which appears on the payment check or the date on which an electronic funds transfer was made.

(j) *Risk of loss.* Unless the contract specifically provides otherwise, risk of loss or damage to the supplies provided under this contract shall remain with the Contractor until, and shall pass to the Government upon:

(1) Delivery of the supplies to a carrier, if transportation is f.o.b. origin; or

(2) Delivery of the supplies to the Government at the destination specified in the contract, if transportation is f.o.b. destination.

(k) *Taxes.* The contract price includes all applicable Federal, State, and local taxes and duties.

(l) *Termination for the Government's convenience.* The Government reserves the right to terminate this contract, or any part hereof, for its sole convenience. In the event of such termination, the Contractor shall immediately stop all work hereunder and shall immediately cause any and all of its suppliers and subcontractors to cease work. Subject to the terms of this contract, the Contractor shall be paid a percentage of the contract price reflecting the percentage of the work performed prior to the notice of termination, plus reasonable charges the Contractor can demonstrate to the

satisfaction of the Government using its standard record keeping system, have resulted from the termination. The Contractor shall not be required to comply with the cost accounting standards or contract cost principles for this purpose. This paragraph does not give the Government any right to audit the Contractor's records. The Contractor shall not be paid for any work performed or costs incurred which reasonably could have been avoided.

(m) *Termination for cause.* The Government may terminate this contract, or any part hereof, for cause in the event of any default by the Contractor, or if the Contractor fails to comply with any contract terms and conditions, or fails to provide the Government, upon request, with adequate assurances of future performance. In the event of termination for cause, the Government shall not be liable to the Contractor for any amount for supplies or services not accepted, and the Contractor shall be liable to the Government for any and all rights and remedies provided by law. If it is determined that the Government improperly terminated this contract for default, such termination shall be deemed a termination for convenience.

(n) *Title.* Unless specified elsewhere in this contract, title to items furnished under this contract shall pass to the Government upon acceptance, regardless of when or where the Government takes physical possession.

(o) *Warranty.* The Contractor warrants and implies that the items delivered hereunder are merchantable and fit for use for the particular purpose described in this contract.

(p) *Limitation of liability.* Except as otherwise provided by an express or implied warranty, the Contractor will not be liable to the Government for consequential damages resulting from any defect or deficiencies in accepted items.

(q) *Other compliances.* The Contractor shall comply with all applicable Federal, State and local laws, executive orders, rules and regulations applicable to its performance under this contract.

(r) *Compliance with laws unique to Government contracts.* The Contractor agrees to comply with 31 U.S.C. 1352 relating to limitations on the use of appropriated funds to influence certain Federal contracts; 18 U.S.C. 431 relating to officials not to benefit; 40 U.S.C. 327, *et seq.*, Contract Work Hours and Safety Standards Act; 41 U.S.C. 51-58, Anti-Kickback Act of 1986; 41 U.S.C. 251 related to whistleblower protections; and 49 U.S.C. 40118, Fly American.

(s) *Order of precedence.* Any inconsistencies in this solicitation or contract shall be resolved by giving precedence in the following order: (1) the schedule of supplies/services; (2) the Assignments, Disputes, Payments, Invoice, Other Compliances, and Compliance with Laws Unique to Government Contracts paragraphs of this clause; (3) the clause at 52.212-5; (4) addenda to this solicitation or contract, including any license agreements for computer software; (5) solicitation provisions if this is a solicitation; (6) other paragraphs of this clause; (7) the

52-30.5

FAC 90—32 OCTOBER 1, 1995

52.212-5

FEDERAL ACQUISITION REGULATION (FAR)

Standard Form 1449; (8) other documents, exhibits, and attachments; and (9) the specification.

(End of clause)

52.212-5 Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items.

As prescribed in 12.301(b)(4), insert the following clause:

CONTRACT TERMS AND CONDITIONS REQUIRED TO IMPLEMENT STATUTES OR EXECUTIVE ORDERS—COMMERCIAL ITEMS

(OCT 1995)

(a) The Contractor agrees to comply with the following FAR clauses, which are incorporated in this contract by reference, to implement provisions of law or executive orders applicable to acquisitions of commercial items:

(1) 52.222-3, Convict Labor (E.O. 11755); and

(2) 52.233-3, Protest After Award (31 U.S.C. 3553 and 40 U.S.C. 759).

(b) The Contractor agrees to comply with the FAR and FIRM clauses in this paragraph (b) which the contracting officer has indicated as being incorporated in this contract by reference to implement provisions of law or executive orders applicable to acquisitions of commercial items or components:

(Contracting Officer shall check as appropriate.)

____ (1) 52.203-6, Restrictions on Subcontractor Sales to the Government, with Alternate I (41 U.S.C. 253g and 10 U.S.C. 2402).

____ (2) 52.203-10, Price or Fee Adjustment for Illegal or Improper Activity (41 U.S.C. 423).

____ (3) 52.219-8, Utilization of Small Business Concerns and Small Disadvantaged Business Concerns (15 U.S.C. 637 (d)(2) and (3)).

____ (4) 52.219-9, Small, Small Disadvantaged and Women-Owned Small Business Subcontracting Plan (15 U.S.C. 637 (d)(4)).

____ (5) 52.219-14, Limitation on Subcontracting (15 U.S.C. 637(a)(14)).

____ (6) 52.222-26, Equal Opportunity (E.O. 11246).

____ (7) 52.222-35, Affirmative Action for Special Disabled and Vietnam Era Veterans (38 U.S.C. 4212).

____ (8) 52.222-36, Affirmative Action for Handicapped Workers (29 U.S.C. 793).

____ (9) 52.222-37, Employment Reports on Special Disabled Veterans and Veterans of the Vietnam Era (38 U.S.C. 4212).

____ (10) 52.225-3, Buy American Act - Supplies (41 U.S.C. 10).

____ (11) 52.225-9, Buy American Act - Trade Agreements Act - Balance of Payments Program (41 U.S.C. 10, 19 U.S.C. 2501-2582).

____ (12) 52.225-17, Buy American Act - Supplies Under European Community Sanctions for End Products (E.O. 12849).

____ (13) 52.225-18, European Community Sanctions for End Products (E.O. 12849).

____ (14) 52.225-19, European Community Sanctions for Services (E.O. 12849).

____ (15) 52.225-21, Buy American Act - North American Free Trade Agreement Implementation Act - Balance of Payments Program (41 U.S.C. 10, Pub. L. 103-187).

____ (16) 52.247-64, Preference for Privately Owned U.S.-Flag Commercial Vessels (46 U.S.C. 1241).

____ (17) 201-39.5202-3, Procurement Authority (FIRM). (This acquisition is being conducted under _____ delegation of GSA's exclusive procurement authority for FIP resources. The specific GSA DPA case number is _____).

(c) The Contractor agrees to comply with the FAR clauses in this paragraph (c), applicable to commercial services, which the Contracting Officer has indicated as being incorporated in this contract by reference to implement provisions of law or executive orders applicable to acquisitions of commercial items or components:

(Contracting Officer check as appropriate.)

____ (1) 52.222-41, Service Contract Act of 1965, As amended (41 U.S.C. 351, et seq.).

____ (2) 52.222-42, Statement of Equivalent Rates for Federal Hires (29 U.S.C. 206 and 41 U.S.C. 351, et seq.).

____ (3) 52.222-43, Fair Labor Standards Act and Service Contract Act - Price Adjustment (Multiple Year and Option Contracts) (29 U.S.C. 206 and 41 U.S.C. 351, et seq.).

____ (4) 52.222-44, Fair Labor Standards Act and Service Contract Act - Price Adjustment (29 U.S.C. 206 and 41 U.S.C. 351, et seq.).

____ (5) 52.222-47, SCA Minimum Wages and Fringe Benefits Applicable to Successor Contract Pursuant to Predecessor Contractor Collective Bargaining Agreement (CBA) (41 U.S.C. 351, et seq.).

(d) *Comptroller General Examination of Record.* The Contractor agrees to comply with the provisions of this paragraph (d) if this contract was awarded using other than sealed bid, is in excess of the simplified acquisition threshold, and does not contain the clause at 52.215-2, Audit and Records—Negotiation.

(1) The Comptroller General of the United States, or an authorized representative of the Comptroller General, shall have access to and right to examine any of the Contractor's directly pertinent records involving transactions related to this contract.

(2) The Contractor shall make available at its offices at all reasonable times the records, materials, and other evidence for examination, audit, or reproduction, until 3 years after final payment under this contract or for any shorter period specified in FAR Subpart 4.7, Contractor Records Retention, of the other clauses of this contract.

52-30.6

FAC 90—32 OCTOBER 1, 1995

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

52.213-1

If this contract is completely or partially terminated, the records relating to the work terminated shall be made available for 3 years after any resulting final termination settlement. Records relating to appeals under the disputes clause or to litigation or the settlement of claims arising under or relating to this contract shall be made available until such appeals, litigation, or claims are finally resolved.

(3) As used in this clause, records include books, documents, accounting procedures and practices, and other data, regardless of type and regardless of form. This does not require the Contractor to create or maintain any record that the Contractor does not maintain in the ordinary course of business or pursuant to a provision of law.

(e) Notwithstanding the requirements of the clauses in paragraphs (a), (b), (c) or (d) of this clause, the Contractor is not required to include any FAR clause, other than those listed below (and as may be required by an addenda to this paragraph to establish the reasonableness of prices under Part 15), in a subcontract for commercial items or commercial components—

- (1) 52.222-26, Equal Opportunity (E.O. 11246);
- (2) 52.222-35, Affirmative Action for Special Disabled and Vietnam Era Veterans (38 U.S.C. 2012(a));
- (3) 52.222-36, Affirmative Action for Handicapped Workers (29 U.S.C. 793); and
- (4) 52.247-64, Preference for Privately-Owned U.S.-Flagged Commercial Vessels (46 U.S.C. 1241)(flow down not required for subcontracts awarded beginning May 1, 1996).

(End of clause)

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52-30.7